Supreme Court, U.S.
FILED
JUN 13 2008
OFFICE OF THE CLERK

95

No. 07-1566

In The
Supreme Court of the United States

RICHARD LOUIS MARCRUM,

Petitioner,

v.

DON ROPER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Banks v. Dretke*, 540 U.S. 668 (2004), the Court granted certiorari on, but did not resolve, the question whether the prejudicial effect of counsel's errors in the penalty phase of a capital case must be assessed individually or cumulatively. The Eighth Circuit's rigid rule that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test" presents, in a non-capital context, the same question, on which the circuits now are divided three to five:

> whether courts addressing Sixth Amendment claims of ineffective assistance of counsel must determine *Strickland* prejudice for each error of trial counsel individually or whether they may evaluate the cumulative effect of counsel's errors to determine whether they undermine confidence in the outcome of the trial.

PARTIES TO THE PROCEEDING

Petitioner Richard Louis Marcrum is a prisoner at the Potosi Correctional Center in Missouri. Al Luebbers was the Superintendent of the Potosi Correctional Center and was the official responsible for the facility at the time this action was filed. Respondent Don Roper is the current Warden of the Potosi Correctional Center and is now the official responsible for the facility.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard Louis Marcrum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1) is reported at 509 F.3d 489 (8th Cir. 2007). The district court's

memorandum and order (App. 53) granting the writ of habeas corpus is not reported.

JURISDICTION

The court of appeals entered its judgment on December 7, 2007. Petitioner filed a timely petition for rehearing and rehearing en banc on January 11, 2008, which was denied on February 14, 2008. App. 101. On May 2, 2008, Justice Alito extended the time to file a petition for writ of certiorari to and including June 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, as applied to the states through the Fourteenth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. It also involves provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This case arises from Richard Louis Marcrum's claim under 28 U.S.C. § 2254 that he received ineffective assistance of counsel during his trial for first-degree murder and armed criminal action. The case presents the question whether courts, when determining if counsel's errors prejudiced a defendant under *Strickland v. Washington*, 466 U.S. 668 (1984), should restrict their inquiry to the effect of each individual error in isolation or should consider whether the cumulative effect of these errors undermines confidence in

the outcome of the trial. This Court previously granted certiorari to address the same question in the capital context in *Banks v. Dretke*, 540 U.S. 668 (2004), but resolved the case on other grounds.

Marcrum's only viable defenses to the June 3, 1994 killing of Kenneth Reeves were not guilty by reason of mental disease or defect (*i.e.*, insanity) and diminished capacity because, as the court of appeals concluded, there was the "serious possibility that on the day of the killing Marcrum was in the throes of a psychosis." App. 36.

The jury, however, never had an opportunity to consider critical evidence in support of Marcrum's defenses. As the court of appeals concluded:

> th[e] jury never saw or heard about medical evidence that, with scrutiny and analysis, could have shown a well-established pattern in which Marcrum failed to take his anticonvulsants, suffered from serial seizures, and fell into a psychosis in which his behavior was paranoid and violent. Nor did the jury see or hear about medical records from the night of the killing diagnosing Marcrum as psychotic and showing a subtherapeutic level of anticonvulsant in his blood.

App. 36.

The jury never heard this critical evidence due to counsel's constitutionally deficient representation in four critical areas:

(1) He failed to timely endorse any of Marcrum's treating physicians as witnesses, including the one who diagnosed Marcrum as "non-oriented to person/place/time" and suffering from "florid psychosis" on the day of the killing, and thus none of Marcrum's doctors was allowed to testify at trial regarding the psychotic and often violent behavior that resulted from Marcrum's failure to take his anticonvulsant medication;

(2) He failed to introduce into evidence any of Marcrum's 22-year history of medical records, many of which showed a direct connection between a lack of medication and psychotic, delusional behavior, including the medical record from the day of the killing showing a nearly contemporaneous diagnosis of "florid psychosis" and a subtherapeutic level of anticonvulsant in Marcrum's system;

(3) He failed to cross-examine the State's expert psychiatrist, who falsely testified that there was no connection between Marcrum's psychosis and violent behavior, despite overwhelming evidence of such a connection in Marcrum's medical records and the expert's own report that said, "when he becomes psychotic . . . [h]e becomes violent"; and

(4) He failed to question his own expert psychologist about Marcrum's diagnosis of "florid psychosis" or the clear pattern shown in Marcrum's other medical records that "his

> confusion and disorientation, as well as his psychotic symptoms, cleared up after therapeutic [anticonvulsant] level was achieved."

Because the State's expert conceded that Marcrum had a mental disease within the meaning of the Missouri insanity statute, Marcrum's mental state on the day of the killing was the central issue in the case. Yet, each time Marcrum's counsel could have introduced the best available evidence on that issue, he failed to do so. Rather than analyze the cumulative impact of these critical errors, however, the court of appeals analyzed each error in a vacuum to conclude that none of them in isolation was prejudicial.

1. Marcrum's Medical History and Trial

Marcrum had a 22-year history of severe mental illness, including organic brain damage, psychosis, seizure disorders, delusions, and paranoid schizophrenia. His medical records document dozens of hospital admissions over the years when he was off his medication and displaying the bizarre manifestations of his illness: He ran through the neighborhood naked, claimed that friends were conducting brain surgery on him, heard voices from the television, and told people that he was God and was going to take them to the "Palace." Marcrum's treating physicians consistently found that he was not taking the anticonvulsant medication prescribed for him when these incidents occurred.

Marcrum's history of mental illness, beginning from the time he was seven years old, was well-documented. In all, Marcrum was in and out of the hospital dozens of times. His medical records from the years immediately before the 1994 killing, as described in excerpts below, evidenced a concrete link between subtherapeutic medication levels and the delusions and psychoses that followed:

> **January 20-21, 1991, Missouri Baptist Hospital of Sullivan**: Dr. Wills' notes state: "25 y/o male found nude having seizures outdoors; apparently he has a long standing history of seizure disorders and is currently not taking meds; ambulance personnel states he had a grand mal seizure in ambulance"; "running in streets this afternoon [without] any clothes on"; "patient stopped taking Dilantin 1 year ago – non compliant"; Dilantin level "0"; "girlfriend states 9 seizures"; "take 200mg Dilantin."

> **April 12-21, 1992, Missouri Department of Mental Health**: Assessment by Dr. Schwarz: "On the day of admission he was noted to be behaving quite strangely, was kicking cars, chasing an older woman and a child down the street. He also told someone that . . . he was talking to the radio about God. . . . Justification for disposition: psychotic, disorganized, unable to care for self. . . . His confusion and disorientation, as well as his psychotic symptoms, cleared up after therapeutic Dilantin level was achieved."

December 9, 1992, St. Louis University Hospital: Dr. Pew's Psychiatry Consultation Report: "brought to ER by EMS stating he had had a seizure. . . . He stated he sees things but did not elaborate. . . . Thought process circumstantial. Markedly delusional. . . . Diagnosis: paranoid schizophrenia."

April 4, 1993, St. Louis University Hospital: Reports of Dr. Hyers (Medicine), Dr. Woolsey (Neurology), and psychiatry consultation: "acutely psychotic patient . . . patient delirious. Constantly moving. . . . Seizure disorder – post traumatic by history with strong psychiatric history. Post-ictal confusion, subtherapeutic anticonvulsant level. . . . He has been having seizures past 2 days."

April 5-10, 1993, Deaconess Medical Center: Dr. Viamontes reported, "In the Emergency Room he was considered acutely psychotic, having auditory hallucinations, he was also intoxicated. Also, he has some type of persecutory delusion. . . . He was walking from his bed, standing up and talking to what appeared to be visual hallucinations. At the time of this evaluation it was difficult to obtain any information from him since he was actively psychotic and hallucinating."

December 28, 1993 – January 12, 1994, Southeast Missouri Mental Health Center: The admitting nurse noted that Marcrum "easily becomes angry . . . denies hallucinations, but is frequently distracted and mumbles to self," and that Marcrum

> "has been non-complaint [with] meds past 1 month." Later in therapy, Marcrum admitted to "auditory hallucinations" and stated that he was "planning to hitchhike to the Lord." His progress notes indicated that Marcrum expressed a belief that "he communicate[s] with God . . . and has some power in order to influence others," and that he "stated friends with whom he lives are doing brain surgery on him."

In the days leading up to June 3, 1994, Marcrum was living at his parents' home and suffered approximately seven seizures. The morning of June 3, he accused his mother of trying to poison him. Around 2:40 p.m., he was observed outside the house of Kenneth Reeves by a witness who testified that Marcrum announced: "Praise the Lord, I just killed one sorry son-of-a-bitch. I'm going to kill another." The witness testified that he and his wife later entered Reeves's home to find him tipped over in his wheelchair and bleeding. A fireplace poker was on the floor.

When Marcrum returned home around 5:00 p.m., he was calling himself God, quoting from the "Bible" – actually a local real estate magazine – and telling people that he was going to take them to the kingdom of heaven. Marcrum's parents called an ambulance.

The medical records from St. Louis Regional Medical Center – to which the jury was never exposed – describe "bizarre behavior" and indicate that Marcrum was "combative," "incoherent," and "speaking in slowed whispers stating 'I am the Chosen One.'" He

was placed in restraints and continued talking to himself. Upon examination, Dr. Eric Gedden noted that Marcrum continued "to warn of the coming of the passages," was "not appropriate in responses," and was "alert, but non-oriented to person/place/time." Marcrum was tested for his anticonvulsant level, which was far below therapeutic. App. 22. Dr. Gedden diagnosed "florid psychosis." The doctor ordered the nurse to "GIVE 500mg DILANTIN PO NOW." The police arrived to arrest Marcrum at the medical center later that night.

Marcrum's family retained a private attorney, Alfred Speer. Speer, in turn, received a file from the public defender, who already had obtained Marcrum's medical records. Speer forwarded the medical records to a psychologist, Allan Barclay. Over a year passed before trial. Neither Speer nor Barclay interviewed any of Marcrum's treating physicians, and Speer failed to endorse any of them until three days into trial. When the trial court asked Speer to explain his late endorsement of these witnesses, Speer admitted that he contacted the doctors – whom he described as "essential to his defense of mental disease or defect" – for the first time after trial had started. The court excluded the witnesses, but expressly told Speer that he could introduce the medical records through Barclay.

Rather than introduce the records, however, Speer expressly told his own expert *not* to discuss them while he was on the stand. Speer later admitted he thought the trial court had excluded the medical records. As a result, Barclay's testimony largely was confined to the psychological tests he performed on

Marcrum, including an IQ test, a memory test, a personality test, and the Rorschach inkblot test. Speer did not ask Barclay any questions about Dr. Gedden's examination and "florid psychosis" diagnosis of Marcrum on the day of the killing.

The State's expert, Dr. Sam Parwatikar, conceded that Marcrum had a mental disease within the meaning of the Missouri insanity statute. The issue therefore was whether Marcrum was suffering from his paranoid schizophrenia, delusions, hallucinations, and psychoses at the time of the killing such that he was incapable of knowing and appreciating the nature, quality, or wrongfulness of his conduct (for insanity) or did not have the capacity to deliberate (for diminished capacity). On that issue, Parwatikar opined that Marcrum was not insane and did have capacity to deliberate at the time in part because there was no record of Marcrum engaging in violent behavior while psychotic. Although the medical records and Parwatikar's own report clearly contradicted this opinion, Speer said he decided not to cross-examine Parwatikar because "[h]e's a tall, good-looking man" with "a very professional demeanor."

The jury convicted Marcrum of first-degree murder and armed criminal action, and the court imposed a sentence of life without the possibility of probation or parole. Marcrum appealed to the Missouri Court of Appeals, which affirmed in a summary decision. 958 S.W.2d 96 (Mo. Ct. App. 1997). The state courts rejected Marcrum's post-conviction appeals. *See* App. 22-23.

2. Habeas Corpus Proceedings in the District Court

The district court had jurisdiction to hear Marcrum's habeas corpus petition under 28 U.S.C. § 2254. The court found Speer's performance was constitutionally deficient because: (1) counsel failed to endorse or call any of the treating physicians as witnesses; (2) counsel failed to introduce any medical records (including the diagnosis of "florid psychosis" only hours after the killing); and (3) counsel failed to impeach the state expert's false testimony that Marcrum's medical records showed no association between his psychotic episodes and violence. App. 92-95.

In determining whether counsel's errors at trial prejudiced Marcrum, the district court found that "this is not a case in which the evidence of guilt of first-degree murder was strong." App. 96. The court found that the only evidence that Marcrum was sane and capable of forming the intent necessary to support a conviction for first-degree murder was the false but unimpeached testimony of the State's expert, "whose testimony would have been significantly undercut through proper use of the medical records." App. 96. This left the court with "little confidence in the outcome of the proceeding." App. 97.

The district court also concluded that the state courts' rejection of Marcrum's claim of ineffective counsel was "objectively unreasonable" because "neither" post-conviction state court:

> addressed the highly probative evidence in the omitted medical records, namely, the multiple incidents of Plaintiff's violent behavior connected to his mental problems, the 'florid psychosis' and non-orientation 'to person/place/time' observed by the admitting physician at the hospital several hours after the murder, and the fact that his medication was found to be significantly below therapeutic level at the time.

App. 94. The court stressed that "[t]he import of these [medical] records cannot be overstated, especially where both the experts and Petitioner himself disclaimed any history of violence during these episodes – a fact the medical records contradicts." App. 94.

Accordingly, the district court granted Marcrum's petition for habeas corpus. App. 99.

3. The Eighth Circuit Opinion

The Eighth Circuit reversed. App. 52.

The court of appeals examined four critical errors made by Marcrum's counsel: (1) the failure to timely endorse Marcrum's treating physician witnesses, who were "essential to his defense of mental disease or defect" (App. 40); (2) the failure to introduce any of Marcrum's medical records, including the "medical records from the night of the killing diagnosing Marcrum as psychotic and showing a subtherapeutic level of anticonvulsant in his blood" (App. 36); (3) the failure to cross-examine Parwatikar using any of the

medical records and Parwatikar's own report, which directly contradicted his testimony (App. 45); and (4) the failure to question Barclay about the "well-established pattern in which Marcrum failed to take his anticonvulsants, suffered from serial seizures, and fell into a psychosis in which his behavior was paranoid and violent." App. 36.

In each instance, the court of appeals excused the prejudicial effect of the error by pointing to what else Speer could have done (although Speer failed to do those other things) until it finally concluded, with respect to the last error, that Speer could not be deemed ineffective because he had hired a qualified expert. App. 49-50. The court, however, never examined the overall cumulative effect of Speer's cascade of errors on the "fundamental fairness of the proceeding." *Strickland*, 466 U.S. at 696.

(a) The Failure to Timely Endorse Treating Physician Witnesses

Although the court of appeals[1] acknowledged that "[w]hat Speer did do wrong was to fail to timely

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[1] Two members of the panel did not concur in the sections of the opinion (Parts III.A and III.B) holding that certain of Speer's errors "resulted from neglect, not reasonable trial strategy." App. 36. Instead, consistent with *Strickland*'s statement that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," 466 U.S. at 697, they joined the portion of the opinion holding that Marcrum was not prejudiced.

disclose as witnesses the doctors and other health-care providers who had treated Marcrum in the past and who would have been able to testify about the contents of the records," the court declared that it "need not treat the failure to call the doctors as witnesses separately from the failure to introduce the records" because there was no evidence that "the various treating doctors would have added anything to the information shown in the medical records." App. 38-39. Thus, the court did not find any prejudice solely as a result of the failure to timely endorse Marcrum's treating physicians because the trial judge "endeavored to limit the damage to Marcrum's case by ruling that Speer could introduce the records [of the excluded physician witnesses] through Barclay." App. 39.

(b) The Failure to Introduce Marcrum's Medical Records

As for the medical records, the court of appeals concluded that Speer's failure to introduce them "was the result of a situation caused by Speer's neglect," but nevertheless determined that the records alone would not have helped Marcrum because they were "couched in medical terminology that would mean almost nothing to a jury of lay people" and "there is no reason to think the jury could have digested them and discerned a causal connection between lack of medication, serial seizures, psychosis, and paranoia and violence." App. 39, 41. Instead, the court believed that expert testimony was necessary to "assess the significance of the medical records showing Marcrum

had a subtherapeutic level of anti-epilepsy drugs," because the jury "was not reasonably likely to piece together the medical records on its own to come to the conclusion that Marcrum's psychosis that night proved he was psychotic during the afternoon." App. 42-43.

(c) The Failure to Cross-Examine the State Expert

The court of appeals concluded that Speer could have used Parwatikar's own report ("when he becomes psychotic . . . [h]e becomes violent") to impeach his testimony that "there was no evidence of any connection between Marcrum's psychosis and violent behavior." Nonetheless, it determined (without deciding whether Speer was deficient in this regard) that "these tactics would have done no good because Barclay also agreed that there was no relationship between the 'nonreality stage' and violence." App. 45-46.

(d) The Failure to Elicit Testimony From the Defense's Expert Witness

Finally, the court of appeals concluded that Speer left the jury "[w]ithout an expert's opinion that the psychosis resulted from a series of seizures, not from a particular one," and without an expert's explanation that "the psychosis would not resolve until Marcrum was medicated with anticonvulsants." App. 42. But here the court eventually determined that Speer could not be judged ineffective because he "obtained the assistance of a qualified expert." App. 49-50.

Although each of Speer's four failures represented a missed opportunity for Marcrum's counsel to introduce the best available evidence regarding Marcrum's state of mind on the day of the killing, the court of appeals excused the individual errors one-by-one by concluding that the evidence could have been introduced other ways. The evidence, however, was not introduced at all. The court did not consider the cumulative prejudicial effect of counsel's failure – at each and every opportunity – to introduce the most probative evidence on the central issue in the case: a nearly contemporaneous diagnosis of "florid psychosis." Instead, the court examined Speer's errors in isolation, ultimately concluding with an outcome-determinative analysis of prejudice, stating: "it is not the failure to introduce the records themselves that would have changed (or had a reasonable probability of changing) the *outcome* of the trial" and "there is no reasonable probability that the jury would have found these items of evidence *determinative*." App. 41 (emphasis added).

Because the court decided that Marcrum did not receive ineffective assistance of counsel, the court also concluded that the state court was not "unreasonable in holding Speer's representation was constitutionally acceptable." App. 51. The court, however, did not analyze independently the application of 28 U.S.C. § 2254(d).

REASONS FOR GRANTING THE WRIT

The circuits are divided three to five on the question of whether instances of deficient attorney performance may be evaluated cumulatively when adjudicating prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The court below – in analyzing the multitude of errors that kept Marcrum's medical history and nearly contemporaneous diagnosis of "florid psychosis" from the jury – followed its long-standing rule that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002). This decision of the Eighth Circuit, and the decision of two other circuits refusing to analyze cumulatively the prejudicial impact of counsel's errors, is in direct conflict with decisions of five circuits, which consider the cumulative effect of counsel's errors in determining *Strickland* prejudice.

Strickland requires that prejudice be determined by analyzing whether the unprofessional failures of counsel "undermine confidence in the outcome" of the trial. 466 U.S. at 694. The "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. The *Strickland* prejudice test is familiar: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Although *Strickland* expressly rejected an "outcome-determinative standard," *id.* at 693-694, *Strickland* does not state whether the prejudice analysis should focus on each of counsel's errors in isolation or all of them together to determine whether they cumulatively would "undermine confidence in the outcome" of the trial. The Court in *Williams v. Taylor*, 529 U.S. 362, 397-399 (2000), however, concluded the state trial court in that case was correct to view the entire post-conviction record "as a whole" in assessing prejudice in the capital phase and that the state supreme court's refusal to "evaluate the totality of the available mitigation evidence" was unreasonable. Similarly, the Court in *Wiggins v. Smith*, 539 U.S. 510, 538 (2003), also assessed prejudice in the capital phase of that case based on the "available mitigating evidence, taken as a whole."

Whether or not prejudice should be analyzed cumulatively goes to the heart of the *Strickland* test and its viability in protecting the right to the effective assistance of counsel. Isolation of each of counsel's errors in a vacuum leads to a mechanical test that focuses, as the court of appeals did here, exclusively on whether or not there is a reasonable probability that a single error determined the outcome of the trial. The non-cumulative approach of the Eighth Circuit, and two other circuits, is thus in practice a form of the outcome-determinative standard rejected by this Court in *Strickland*.

Alternatively, looking at all of the errors cumulatively, as five other circuits do, broadens the inquiry

to the entirety of the circumstances in determining whether all of counsel's errors undermine confidence in the reliability of the outcome. Resolution of this split in the circuits is necessary to secure a uniform approach to the evaluation of ineffective of assistance of counsel under the Sixth Amendment.

This case demonstrates the striking difference between the two approaches. The approach of the Eighth Circuit in addressing each of counsel's errors in isolation led to the determination that none of them alone was outcome determinative: each error was not in itself fatal because counsel could have introduced the critical evidence in other ways. The cumulative approach of five other circuits, however, readily would support the determination that counsel's repeated errors in failing to present critical evidence on Marcrum's insanity and diminished capacity defenses, including a medical diagnosis of his state of mind on the day of the killing, would undermine confidence in the outcome of the trial. Because this case sharply illustrates the difference between the two approaches, it provides an appropriate vehicle to resolve the split.

The split within the circuits is mature. The positions of eight of the circuits are well-defined and long-standing. This circuit split is one that can be resolved only by this Court.

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION WHETHER COUNSEL'S ERRORS SHOULD BE ASSESSED INDIVIDUALLY OR CUMULATIVELY TO DETERMINE PREJUDICE UNDER *STRICKLAND*.

In the twenty-four years since the Court's decision in *Strickland*, the courts of appeals have divided on whether instances of deficient attorney performance may be viewed cumulatively when determining prejudice under *Strickland*. This Court granted certiorari in *Banks v. Dretke*, 540 U.S. 668 (2004), to resolve the same question in the capital context:

> Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without the impact of the evidence collectively?

The Court did not resolve the question, however, because the petitioner was entitled to relief on other grounds. *Banks*, 540 U.S. at 689 n.10.[2]

The Eighth Circuit holds that prejudice must be evaluated from each instance of deficient attorney performance individually. The Fourth and Sixth Circuits join the Eighth in holding that instances of

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[2] The Court in *Banks* granted certiorari on three of the four questions presented in the petition.

deficient performance may not be cumulatively evaluated to show prejudice where each individual instance of deficient performance is not sufficient to show prejudice alone. The First, Second, Seventh, Ninth, and Tenth Circuits all hold that prejudice from attorney error may be established by cumulatively evaluating all of the instances of deficient performance by trial counsel.

Despite this Court's decisions in *Williams* and *Wiggins*, *Strickland* still creates confusion in the courts of appeals. Some courts of appeals rely on *Strickland*'s statement that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 466 U.S. at 697. These courts determine prejudice for each alleged instance of deficient attorney performance in isolation.

In contrast, other courts of appeals read *Strickland* to require the aggregation of individual instances of deficient attorney performance when evaluating prejudice. These courts focus on *Strickland*'s concern that "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged." *Id.* at 696 (emphasis added). These courts also rely on *Strickland*'s emphasis that "a court hearing an ineffectiveness claim must consider the *totality of the evidence* before the judge or jury." *Id.* at 695 (emphasis added). Finally, these courts point to *Strickland*'s use of the plural "unprofessional errors" to justify aggregation of

individual instances of deficient attorney performance when determining prejudice. *Id.* at 694.

A. The Eighth Circuit refuses to assess instances of deficient attorney performance in the aggregate. In *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006), the court had "no hesitancy in . . . concluding the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief." The court rejected any argument that either *Strickland, Williams*, or *Wiggins* mandates the aggregation of attorney error. The court further stated that it "repeatedly [had] recognized 'a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.'" *Id.* (quoting *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002)).

The Fourth and Sixth Circuits, like the Eighth Circuit, reject the aggregation of error in evaluating prejudice:

> **Fourth Circuit:** In *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998), the Fourth Circuit held that none of the instances of deficient performance individually caused prejudice and refused to determine whether, if viewed cumulatively, these instances would have undermined confidence in the outcome of the proceeding: "To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do

so now." *See also Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999) (stating that *Fisher* "squarely foreclosed" argument that "*cumulative* effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation").[3]

Sixth Circuit: In *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004), the Sixth Circuit held that because the petitioner "has not shown that any of the alleged instances of ineffective assistance of counsel deprived him 'of a fair trial, a trial whose result is reliable[,]' *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, he cannot show that the accumulation of these non-errors warrant relief." *See also Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000) ("Because the individual claims of ineffectiveness alleged by Seymour are all essentially meritless, Seymour cannot show that the cumulative error of her counsel rendered him ineffective.").[4]

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[3] The Fourth Circuit appeared to perform a cumulative prejudice analysis in *Hedrick v. True*, 443 F.3d 342, 359 (4th Cir. 2006) ("even when considering these alleged deficiencies as a whole, we find no prejudice from their collective effect"), but did not address the validity of the *Fisher* rule.

[4] In a later unpublished and nonprecedential opinion, the Sixth Circuit held that "any prejudice resulting from this error must be considered in combination with other errors, if any" and that the evaluation of "the cumulative effect of all of [counsel]'s errors below instead of considering each individually" was "in accord with the clear precedent of *Strickland*." *Mackey v. Russell*, 148 Fed. App'x 355, 367 (6th Cir. 2005).

B. The Eighth Circuit's refusal to view individual instances of deficient attorney performance in the aggregate when determining prejudice under *Strickland* squarely conflicts with the decisions of the First, Second, Seventh, Ninth, and Tenth Circuits:

> **First Circuit:** In *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005), the First Circuit held that "'*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.'" (quoting *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989)).
>
> **Second Circuit:** In *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001), the Second Circuit considered the "errors in the aggregate" because "*Strickland* directs us to look at the 'totality of the evidence before the judge or jury.'" (quoting *Strickland*, 466 U.S. at 695-696). *See also Pavel v. Hollins*, 261 F.3d 210, 216 (2d Cir. 2001) (holding that "*cumulative* weight" of counsel's flaws resulted in prejudice); *Eze v. Senkowski*, 321 F.3d 110, 126 (2d Cir. 2003) (assessing "cumulative effect of these alleged deficiencies").
>
> **Seventh Circuit:** The Seventh Circuit has allowed the consideration of "the cumulative effect of counsel's errors in determining whether a defendant was prejudiced" since 1989. *Kubat*, 867 F.2d at 370. Since then, the

court has reaffirmed that holding multiple times. *See Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) (holding that state court in "weighing each error individually . . . overlooked a pattern of ineffective assistance and unreasonably applied *Strickland*"); *Earls v. McCaughtry*, 379 F.3d 489, 495-496 (7th Cir. 2004) (where "defense attorney made multiple errors as opposed to a single error, the cumulative effect of those errors should be considered together to determine the possibility of prejudice"); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors.").

Ninth Circuit: In *Harris v. Wood*, 64 F.3d 1432, 1439 (9th Cir. 1995), the Ninth Circuit found "cumulative prejudice," thus "obviat[ing] the need to analyze the individual prejudicial effect of each deficiency." *See also Silva v. Woodford*, 279 F.3d 825, 834 (9th Cir. 2002) ("our cases have also held that cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel").

Tenth Circuit: In *Denton v. Ricketts*, 791 F.2d 824, 828 (10th Cir. 1986), the Tenth Circuit analyzed prejudice cumulatively: "Upon reviewing the cumulative effect of these actions, we do not think there is a 'reasonable probability' that without them the result of

> the trial would have been different." Recent Tenth Circuit cases have also evaluated prejudice from individual instances of deficient performance cumulatively. *See Parker v. Scott*, 394 F.3d 1302, 1324 (10th Cir. 2005) (stating as part of prejudice analysis that "none of counsel's acts, either alone or cumulatively, rise to the level necessary to justify granting the habeas petition."); *Fisher v. Gibson*, 282 F.3d 1283, 1307-1311 (10th Cir. 2002) (examining multiple instances of deficient attorney performance cumulatively for prejudice).

The courts of appeals are divided. The Fourth, Sixth, and Eighth Circuits analyze the prejudicial impact of each of counsel's errors in isolation, while the First, Second, Seventh, Ninth, and Tenth Circuits analyze all of counsel's errors cumulatively for prejudice.

II. THE CIRCUIT SPLIT PRESENTS AN IMPORTANT QUESTION WHETHER CUMULATIVE ASSESSMENT OF COUNSEL'S ERRORS IS NECESSARY TO ENSURE THE "FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS."

Whether or not counsel's errors are analyzed cumulatively is central to the evaluation of *Strickland* prejudice and to the guarantee of effective assistance of counsel under the Sixth Amendment. Although the Court in *Strickland* admonished that "a court should keep in mind that the principles we have stated do not establish mechanical rules," 466 U.S. at

696, the non-cumulative approach of the Fourth, Sixth, and Eighth Circuits, in reviewing each error alone, is such a mechanical rule that inevitably leads to a standard for prejudice focused only on whether a particular error would have changed the result of the trial. Indeed, the Eighth Circuit's approach in this case led it to just such an outcome-determinative standard, which was rejected expressly by this Court in *Strickland*. 466 U.S. at 693-694.

Without consideration of all of counsel's errors in view of the totality of the evidence, courts cannot determine whether or not these errors would undermine confidence in the outcome of the trial. By confining the prejudice inquiry to each individual error of counsel, courts cannot fully evaluate what the Court in *Strickland* called the "ultimate focus of inquiry": the "fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. The cumulative approach of the First, Second, Seventh, Ninth, and Tenth Circuits, on the other hand, avoids the mechanical rule of reviewing each error alone and allows these courts to assess fully whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

The Court's focus in *Strickland* on the fundamental fairness and reliability of the proceedings in evaluating ineffective assistance of counsel claims is consistent with its review of claims under *Brady v. Maryland*, 373 U.S. 83 (1963). In that context, the question is whether in the absence of the undisclosed

evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence"; there is no doubt that question "turns on the *cumulative* effect of all such evidence suppressed by the government." *Kyles v. Whitley*, 514 U.S. 419, 421, 434 (1995) (emphasis added). Whether under *Strickland* or *Brady*, the cumulative approach is necessary to ensure the reliability of criminal proceedings.

The difference between the two approaches matters. In this case, the court of appeals sliced up counsel's errors, and their potentially prejudicial impact, so thinly that the court's analysis of each error may, at first glance, appear reasonable. It is true that the late endorsement of Marcrum's treating physicians would not have been as prejudicial had Speer listened to the trial court and introduced the medical records through his expert. It is also true that introduction of the medical records alone would not have had the same impact without a doctor to explain them – although one may question how much explanation is required of a medical record that documents a nearly contemporaneous diagnosis of "florid psychosis." And it is true that Speer's failure to cross-examine the State's expert would not have been as damaging had Speer not failed to ask his own expert the right questions. Perhaps, as the court of appeals seemed to think, all of these errors could have been corrected had Speer hired a different expert – or simply asked his own expert the right questions.

The problem is that Speer did none of these things. Add up all of these errors, and one is left with the unshakable conclusion that the jury never had an opportunity to consider, much less evaluate, what the court of appeals described as the "serious possibility that on the day of the killing Marcrum was in the throes of a psychosis." App. 36. That is because the *cumulative* effect of all of Speer's errors was that, in the words of the court of appeals:

> th[e] jury never saw or heard about medical evidence that, with scrutiny and analysis, could have shown a well-established pattern in which Marcrum failed to take his anticonvulsants, suffered from serial seizures, and fell into a psychosis in which his behavior was paranoid and violent. Nor did the jury see or hear about medical records from the night of the killing diagnosing Marcrum as psychotic and showing a subtherapeutic level of anticonvulsant in his blood.

App. 36.

It is the combination of Speer's errors that kept this critical evidence from the jury. In isolation, as the court of appeals concluded, none of Speer's failures alone kept the evidence out. The failure to timely endorse the treating physicians did not do it, because Speer still could have introduced the medical records through his expert. The failure to introduce the medical records did not do it, because Speer could have cross-examined Parwatikar about the evidence. And the failure to cross-examine Parwatikar did not

do it, because Speer could have asked the questions of his own expert. Put all of these failures together, however, and one is left not with what could have happened, but instead with the reality of what did happen: the jury never heard the best available evidence of Marcrum's mental state on the day of the killing. The court of appeals never considered the cumulative impact of all of Speer's errors that kept this critical evidence from the jury.

That is more than enough to "undermine confidence in the outcome" of the trial – *if* the prejudicial impact of Speer's errors is addressed cumulatively. This case exposes the substantial difference in the approaches of the circuits and the ultimate effect the difference has on the underlying standard of *Strickland* prejudice. Issuance of the writ of certiorari is necessary to resolve this important question – which divides the courts of appeals – whether the refusal to consider the cumulative prejudicial effect of multiple errors of counsel is consistent with the "ultimate focus of inquiry" in *Strickland* on the "fundamental fairness of the proceeding." *Id.* at 696.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3930

Richard Louis Marcrum,	*	
	*	
Petitioner-Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Missouri.
Al Luebbers,	*	
	*	
Respondent-Appellant.	*	

Submitted: May 17, 2006
Filed: December 7, 2007

Before LOKEN, Chief Judge, JOHN R. GIBSON, and COLLOTON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.[1]

The Superintendent of the Potosi Correctional Center, Al Luebbers, appeals from the district court's grant of a writ of habeas corpus to petitioner Richard

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[1] Chief Judge Loken and Judge Colloton concur in all but Parts III.A and III.B of this opinion.

Louis Marcrum. The district court granted the writ on the ground that Marcrum's Sixth Amendment rights were violated by ineffective assistance of counsel at his trial for murder and armed criminal action in connection with the 1994 killing of Kenneth Reeves. The district court held that trial counsel's failure to introduce witnesses and medical records establishing that Marcrum was psychotic on the day of the killing and to cross-examine the prosecution's expert fell below the level of legal representation to which Marcrum was entitled under the Sixth Amendment and that there was a reasonable probability that the result of Marcrum's trial would have been different without counsel's errors. The Superintendent contends that trial counsel's actions regarding the witnesses and records and his decision not to cross-examine the expert were not errors but strategic decisions; that there is no reasonable probability these actions affected the trial's result; and that in any case, the state courts' resolution of these questions was not so unreasonable as to warrant federal habeas relief. He also contends that Marcrum's petition was time-barred. We reverse.

I.

There is overwhelming evidence that on June 3, 1994, Marcrum took a fireplace poker and killed a Presbyterian minister named Kenneth Reeves. The state's theory was that Marcrum had been blackmailing Reeves and killed Reeves when Reeves balked at giving him money. Marcrum's theory was that he was

at Reeves's house because they were lovers, and he denied killing Reeves. At the same time, Marcrum also raised the defense that he was insane because of a seizure disorder that rendered him psychotic on that day. The district court held that Marcrum's trial counsel was ineffective in presenting his insanity and diminished capacity defenses.

Because the legal issues in this case depend on the difference between what facts were known to the jury at Marcrum's trial, to Marcrum's trial counsel, and to the state court hearing Marcrum's motion for postconviction relief, we must tell this story in layers. We begin with the evidence at Marcrum's trial.

A. The trial

Around 2:00 to 3:00 in the afternoon of June 3, 1994, Gary and Donna Paszkiewicz drove by the home of their neighbors Kenneth and Katie Reeves in Imperial, Missouri. They saw the petitioner, Richard Marcrum, standing in the road near a blue-gray car, and as they passed him, he seemed to want to talk to them. Gary Paszkiewicz rolled down the window of his truck and Marcrum said to him, "Praise the Lord, I just killed one sorry son-of-a-bitch," and "I'm going to kill another." Discomfited by this exchange, the Paszkiewiczes drove on, but they soon returned to check on their neighbors. They found Kenneth Reeves lying on the floor by his wheelchair in a pool of blood. His skull had been crushed, and a bloody fireplace

poker was on the floor. Reeves died of his injuries two days later.

When police contacted Reeves's wife, Katie, she tipped them to investigate Marcrum. Police Captain Edward Kemp arrived at Marcrum's house to find that he had been taken to the emergency room of St. Louis Regional Medical Center in an ambulance. Kemp found Marcrum on a gurney in an examining room. As soon as Marcrum caught sight of Kemp, he said, "I know why you're here. It's because of George. . . . I killed George in Kimmswick. He also goes by the name of Kenny Reeves." Marcrum said that Reeves was "evil." Kemp saw blood splatters on Marcrum's clothes. Those clothes were later introduced as exhibits at trial, and DNA samples taken from blood on the clothing were identified as being Kenneth Reeves's DNA.

Katie Reeves testified that Reeves was a Presbyterian minister who often helped the poor using the Reeveses' own money. Reeves had been paralyzed after falling from a tree and was a paraplegic. She said Reeves had employed Marcrum in 1987 or 1988 to refinish some furniture; Reeves had paid Marcrum the promised amount, but Marcrum never finished the job. Nevertheless, Marcrum had telephoned the couple demanding more money. The jury heard a tape of telephone conversations between Marcrum and Katie Reeves in which Marcrum demanded money and made threats to expose Reeves as a homosexual if they didn't pay him. Katie Reeves also testified that after her husband's death, she found that he had

drawn checks on their checking account that were not reflected in the register, though the balance was adjusted surreptitiously to compensate for the amounts drawn. Katie Reeves was a schoolteacher, and she testified that in the year or so before his death, Reeves would call her at school before she left in the afternoon just to find out if she was still at school. She testified that after Reeves's death, she learned that Reeves had co-signed an auto loan with Marcrum shortly before he was killed.

A teller from the local bank testified that Kenneth Reeves came through the drive-through often during the winter and spring of 1994 cashing checks for hundreds of dollars at a time. She said that Marcrum brought in checks signed by Reeves "more than several times" and that her supervisor had checked with Reeves and had given her permission to cash the checks for Marcrum.

Marcrum testified in his own defense. He described a ten-year sexual relationship with Kenneth Reeves that began when Marcrum was about twenty years old and Reeves picked him up at Tower Grove Park in St. Louis. Marcrum testified that he had trysts with Reeves as often as two or three times a week and that Reeves had given him an estimated $90,000 over the course of their relationship. He said that Reeves had bought him at least four cars over the years.

Marcrum testified that he had suffered from seizures since the age of 16, when he went through a

windshield in a car wreck. He said he had been hospitalized "a time or two" for psychiatric problems.

Marcrum said that he did not remember going to Reeves's house the day of the killing, and in fact did not remember that day at all. He was roundly impeached with prior inconsistent statements he had made that he remembered having drinks with Reeves at Reeves's house that day, and that he had a seizure, woke up to find Reeves in a pool of blood, and fled the house. The prosecutor cross-examined Marcrum about the effects of a seizure and Marcrum conceded that when he has a seizure he is "basically helpless" – he loses control of his bladder and bowels and would not be able to drive a car. The prosecutor asked, "Your seizures and after effects are passive, of a nonviolent nature?" and Marcrum answered, "That's what I've been told, yes."

Beginning with Marcrum's mother, Marcrum's lawyer put on a number of witnesses and asked them whether they saw blood on Marcrum on June 3. Marcrum's mother, father, and brother all said they did not see blood on him, despite having checked him when he came into the house. Judy and Don Paszkiewicz, the Reeveses' neighbors, both said they did not notice any blood on him, either.

Marcrum's counsel introduced testimony of a car dealer who had sold Kenneth Reeves a gray-blue Buick shortly before the killing. Reeves paid $500 down for the car and co-signed an installment contract for the remainder of the purchase price with

Marcrum. Marcrum's father, mother, brother, and friend Judith Quick all testified that they saw Reeves pick Marcrum up many times. They said Reeves would routinely pick Marcrum up around 8:30 in the morning and bring him home about 1:00 in the afternoon. Marcrum's former girlfriend, Marilyn McManus, testified that when Marcrum lived with her, Reeves used to come by and bring Marcrum money, or else she and Marcrum would go to Reeves's house or church to pick up money. McManus said that Marcrum did not have to work because Reeves gave him money. Marcrum's mother said that every time Marcrum left with Reeves, he would come home with several hundred dollars. Judith Quick said she saw Marcrum with checks from Reeves for hundreds of dollars.

Marcrum's mother, father, brother, and Marilyn McManus and Judith Quick, all testified about Marcrum's seizures and about Marcrum's bizarre behavior, which they associated with the seizures. Each of these lay witnesses had his or her own interpretation of Marcrum's behavior. Marilyn McManus had her own elaborate typology, classifying Marcrum's seizures into types, ranging from mild (in which he was disoriented) to moderate (in which he would jerk, wet himself, vomit, and foam at the mouth) to severe (in which he would make sounds like a rabid dog and sleep for a week afterward, not even waking up when he relieved himself in the bed). McManus described an "aftermath" of the seizures when "Rickie would say he was God, he was Jesus, he's

taking the children to his kingdom." McManus said the aftermath could last as long as three or four days, and when Marcrum woke up, he would not remember anything. She later broke the "aftermath" into two stages: first Marcrum was "God and Jehovah and Jesus," but then he would be "very nice" and "like an angel" and would clean the house obsessively. Later, however, she described an occasion when he twisted her arm when he was in an "aftermath." The witnesses said that the bizarre behavior could happen before a seizure, but they also said that after seizures, Marcrum would often think he was God and would rant about being God and taking people with him to heaven. Judith Quick described Marcrum pounding on people's cars in the grocery store parking lot, saying he was God. Sometimes he would think people were trying to kill him.

Various family and friends described taking Marcrum to the hospital during these episodes, where he would be medicated and released, according to his mother, because he did not have health insurance. McManus said his condition got worse in 1993, so that by the time of their last four months together (in 1993), Marcrum could have six or seven seizures in a day. Their relationship ended on December 27, 1993, when he twisted her arm during one of his "aftermaths" and he was arrested.

Marcrum also presented testimony from a sheriff's deputy who arrested Marcrum for assaulting McManus on that day. When he responded to the call, Marcrum was standing in the driveway saying he

was God and that he had molested and abducted children. Marcrum said, "I am the promise and the children come unto me to the palace and they do construction work." Marcrum resisted arrest, and it took three troopers to subdue him.

Marcrum's family testified that Marcrum had been suffering from seizures the last few days before Reeves was killed. His brother was in the room with him the night before and heard him making weird sounds and saw him shaking in his sleep. The morning of June 3, Marcrum accused his mother of offering him poisoned coffee. He left the house that morning and returned about 5 p.m. When he returned, he was calling himself God, "screaming at the top of his lungs about his kingdom and how he's God and quoting from the Bible, which was nothing but one of those free real estate magazines you pick up at the store." His brother took away his car keys and called the ambulance.

The ambulance driver testified that he thought Marcrum was intoxicated because the family told him Marcrum had been drinking and because he had slurred speech and a staggering gait. The driver said Marcrum did not seem to have had a seizure because he was "up and walking around." Marcrum's counsel introduced the results of a blood test from that night that showed Marcrum's blood alcohol content on June 3 was from 0 to 10 milligrams per deciliter, but there was no evidence about the significance of those findings. In closing argument, counsel said of those test results, "I don't know what it means," but then

argued it meant Marcrum was not drunk. By way of comparison, the legal blood alcohol limit for driving in Missouri is eight times higher than 10 milligrams per deciliter, see Mo. Rev. Stat. § 577.012 (0.08% blood alcohol by weight excessive) and *Jarrett v. Woodward Bros.*, 751 A.2d 972, 976 n.4 (D.C. Ct. App. 2000) (100 mg/dL equivalent to 0.1% alcohol in blood by weight). Of course, the test did not distinguish between amounts of 0 to 10 milligrams, so Marcrum may have had no alcohol in his blood at all.

Throughout the trial there had been some evidence that Marcrum had a history of alcohol and other substance abuse. Probably the most damaging testimony of this sort came from Marilyn McManus, who testified on questioning by Marcrum's lawyer:

> Q: Sometimes when he was in this fourth phase or type [of seizure], would he beat you?
>
> A: Not during the seizure, no.
>
> Q: I mean after the aftermath or before or somehow, would he beat you till you're black and blue? . . .
>
> A: Not during the aftermath and the seizure, no. . . .
>
> A: When he was drinking, like I said, he did drink. The times that he did drink he has beaten me while he has been drunk, he has. . . .
>
> A: There was times that he has drank and he has hit me and he has not had a seizure.

McManus also said that the alcohol abuse often precipitated seizures.

The last evidence at trial was the expert testimony on the subject of Marcrum's mental state.

Marcrum called Dr. Allan G. Barclay, a Ph.D. in clinical psychology. Dr. Barclay opined that Marcrum suffered from a mental disease or defect, specifically that "he suffers from an organic personality disorder subsequent to the seizure disorder and the history of substance abuse in the past and the trauma [from the car wreck]." He testified that a personality disorder is an enduring characteristic of a person, whereas delusions and psychosis can come and go. When Marcrum's counsel asked whether the mental disease or defect would have compelled Marcrum to commit the killing, Barclay answered, "Yes." Similarly, Barclay said that the seizures could cause impulsive behavior and that this could preclude Marcrum from using a "logical, rational approach, the planning of any kind of activity."

Barclay did not explain on direct examination what relationship might exist between Marcrum's seizures and his delusions. The prosecutor touched on this connection during cross-examination, but only to make the point that the symptoms of the mental disease or defect came and went with the seizures, leaving Marcrum lucid and able to think rationally at other times. The prosecutor established that during the actual seizures and the post-ictal (post-seizure) period, Marcrum would be physically and mentally

debilitated, so that he would not be able to drive a car or coordinate his movements, or do any purposeful act of violence, such as picking up a poker and "precisely, accurately and deliberately [landing] four or five direct blows to someone's skull." In a telling moment, the prosecutor got Barclay to admit that he could not infer whether Marcrum was in possession of his faculties at the time of the killing:

> Q: You don't know whether on June 3, 1994 he was in the reality phase or in the loss of the reality phase, do you?
>
> A: I can't testify to that because I wasn't present.

Further, the prosecutor's questioning elicited testimony from Barclay tending to show a one-on-one relationship between seizures and "loss of reality":

> Q: The seizure is the trigger, isn't it?
>
> A: Yes. . . .
>
> Q: If the mental disease or defect nonreality stage is not triggered and he's in the reality stage, . . . it must be your opinion that the mental disease or defect would not cause impulse [sic] behavior; isn't that true?
>
> A: If I follow your line of reasoning, yes.

Barclay later agreed there was "no history of psychosis without seizure." The prosecutor asked if Marcrum had ever been violent in the "post-ictal" stage, and Barclay answered that there was no record of that. Furthermore, the prosecutor established

through Barclay that if Marcrum were in a "nonreality" state, he would not be able to remember what he had done on June 3, but his statements to the state's psychiatrist, Dr. Parwatikar, indicated that he did remember many events that took place that day at the Reeveses'.

On redirect, Barclay stated that Marcrum had "intermittent psychotic episode[s] from time to time associated with the organic brain damage and seizure disorder." When reminded about Marcrum's history of seizures the night before June 3, his accusation of poisoning that morning, his claim to be God that evening, Barclay agreed that it would be "consistent" with that history to conclude that Marcrum was psychotic at the time of the killing. Barclay also opined that a person in a psychotic state could drive a car and do other purposeful activities, such as hitting someone over the head.

The testimony of the state's psychiatrist, Dr. Sam Parwatikar, was largely consistent with Barclay's. In particular, Parwatikar testified that seizures make a person unconscious and physically debilitated, so that a person in a seizure could not attack someone and it was not probable that a person in a post-ictal stage could do so. Parwatikar expressly conflated the post-ictal state with psychosis, referring to Marcrum's "post-ictal psychotic period," during which he said it would be difficult or impossible for Marcrum to drive a car. Parwatikar testified that there was no record of Marcrum ever being in a "non-reality" state without having suffered a seizure and that there was no

record of Marcrum engaging in violent behavior while psychotic. Marcrum's counsel did not cross-examine Parwatikar, except to establish that he was paid by the state.

The court instructed the jury on first-degree murder (murder with deliberation), second-degree murder, and armed criminal action. It instructed them that they could find that Marcrum was not guilty by reason of mental disease or defect if the greater weight of the credible evidence showed that at the time of the conduct he had a mental disease or defect that made him incapable of knowing and appreciating the nature, quality, or wrongfulness of his conduct. It also instructed them that they could consider evidence that Marcrum did or did not have a mental disease or defect in deciding whether Marcrum had the state of mind required to be guilty of first degree murder.

The prosecutor argued in closing that Marcrum killed Reeves out of "pure, simple, desperate greed," as part of a blackmail scheme. He concentrated on the gruesomeness of the killing and Reeves's helplessness and asked the jury to imagine being in Reeves's position.

Marcrum's defense was based on both the idea that he did not commit the killing and the idea that he was insane. Marcrum's lawyer argued that the Paszkiewiczes and Marcrum's family did not see blood on him after the killing, which cast doubt on whether Marcrum was the killer. He never offered a

theory as to how or when Reeves's blood got on Marcrum's clothes that were exhibited at trial. Counsel also argued that Marcrum was psychotic on June 3, 1994. He argued at length that Marcrum's seizures could set off a psychotic episode that could go on for days.

On rebuttal, the prosecutor argued that if Marcrum had had a seizure at Reeves's house, he would have been incapable of hitting Reeves and driving home, and that if there was no seizure at Reeves's house, there could be no psychosis: "The seizure is the trigger, his own doctor said. So if he didn't have a trigger – if he didn't have a seizure then the psychosis would not manifest." He argued, "The evidence in this case is that when he's psychotic, he's not violent." Conversely, he said, "When he's in his violent stage, he's rational, he's not psychotic."

The jury found Marcrum guilty of first-degree murder and armed criminal action in connection with first-degree murder. He was sentenced to life in prison without the possibility of parole.

Marcrum appealed to the Missouri Court of Appeals, which affirmed in a summary decision. *State v. Marcrum,* 958 S.W.2d 96 (Mo. Ct. App. Dec. 30, 1997).

B. State Post-conviction Proceedings

Marcrum moved for post-conviction relief in the state courts under Missouri Supreme Court Rule

29.15, contending among other things, that his trial counsel was ineffective for failure to call medical witnesses, failure to introduce into evidence the records of his previous hospitalizations for psychiatric crises, and failure to cross-examine Dr. Parwatikar. He produced a new expert, Dr. William Logan, a forensic psychiatrist. Logan reviewed the same records that had been made available to Barclay, and he agreed that Marcrum has a seizure disorder which had developed into an organic personality disorder. However, Logan added one crucial idea: that when Marcrum was having uncontrolled seizures – that is, when he was not being medicated with anti-epilepsy drugs like Dilantin – he would develop organic psychosis. This was different from the personality disorder diagnosed by Barclay and Parwatikar: "[A] person with an organic personality doesn't have hallucinations and doesn't develop bizarre delusional beliefs. A person with organic psychosis does." Logan found Marcrum's medical records showed he had a record of failing to take the anti-epilepsy medicine necessary to control his seizures.

Logan opined that, contrary to the trial testimony, there was not a simple one-on-one relation between seizures and psychotic episodes:

> The impression left from the testimony was that he would have a seizure and then that immediately would trigger a psychotic episode. It doesn't happen that way.
>
> What happens is that a person goes through a period where there are a number

> of seizures and their epilepsy is uncontrolled. When that happens, psychotic features begin to emerge, but there's no direct triggering effect. . . .
>
> Q: So is it possible for a seizure to trigger an episode of organic psychosis?
>
> A: Not usually one, it would usually have to be a number of them in fairly close succession. . . . [T]he more usual history is that a person goes through a period where they get off their medication, they have a number of seizures, then they begin to have some odd delusional beliefs.

Later, he explained:

> That's really one of the key problems I saw in the testimony [of the experts at trial] is this was not behavior triggered by a seizure [or] occurring in the immediate aftermath of a seizure. This was in fact, behavior that occurred as a result of a number of seizures which produced a psychotic state which is something quite different.

Logan used the medical records which had been made available to Barclay to substantiate his theses that (1) Marcrum had in the past become psychotic after uncontrolled seizures, which in turn resulted from failure to take his anti-epileptic medicines; (2) the psychosis lasted far beyond the post-ictal period for particular seizures, and in fact did not resolve until Marcrum was back on the anti-epilepsy medicines; and (3) when psychotic, Marcrum became

violent and subject to religious delusions. Logan furthermore used testimony and medical records from the day of the killing to show Marcrum had not been taking his medicine for several days before the killing and was demonstrably psychotic on the morning of June 3 when he accused his mother of poisoning him, at mid-afternoon when he told the Pakiewiczes, "Praise the Lord, I just killed one sorry son-of-a bitch," and on the evening of June 3 when he claimed to be God. Logan pointed to other incidents documented in the medical records where Marcrum was violent and psychotic, but was not "in the middle of a seizure."

Logan opined that Marcrum was psychotic at the time of the killing and that he could not appreciate the nature, consequences, and wrongfulness of his actions.

The post-conviction proceeding moved on to explore why Marcrum's trial lawyer, Alfred Speer, had not called medical witnesses from Marcrum's past hospitalizations, introduced the records from those crises, or cross-examined Dr. Parwatikar. By way of background, the murder trial transcript showed that on June 6, 1996, the third day of trial, Speer first endorsed Denise Hacker and Dr. Kim Young, from the Southeast Missouri Mental Health Center, where Marcrum had been treated for a psychotic episode in December 1993. Also on June 6, Speer endorsed the two ambulance workers who took Marcrum to the hospital the night of the killing. The state objected to the late endorsement of these witnesses, and at the

hearing on the state's objection, Speer further endorsed Drs. Viamontes and Gedden, who treated Marcrum in the emergency room on the night of the killing. The trial court observed that the case had been filed over two years ago and that the defense had had ample opportunity for discovery, but had failed to comply with the court's scheduling order. The court mediated the situation by allowing Speer to call the ambulance workers, but excluding the doctors, ruling, however, that the defense could use the medical records those doctors would have introduced, since the defense could bring out those prior hospitalizations through either its own or the state's expert. However, as it happened Speer did not introduce the records in examining either expert.

Speer testified at the post-conviction hearing about why he had not introduced the medical records from the past psychiatric crises or from June 3 and why he had not cross-examined the state's expert Parwatikar. He said that "those [records] that were necessary to arrive at the medical opinion were introduced. Beyond that, I saw no need for it." He qualified that to say that "there were some medical records I thought at one point we wanted to get in and because they were late arriving, the Court declined to let them in. I'm not so sure they would have been at all helpful." The state's lawyer then asked whether Speer had "some concerns about the length of trial," and Speer said he did generally. Then he said he did not like to introduce cumulative evidence and that in this case there was plenty of "paper work"

without the medical records. He also stated that he sought to avoid introducing evidence of Marcrum's history of pedophilia and of violence, which would have been revealed by the medical records. As to his failure to cross-examine Parwatikar, Speer said:

> Again, it gets down to what I consider, and this is a tactical judgment, Dr. Sam projects a very professional image. He's a tall, good-looking man. He has a very professional demeanor. He's commanding in his appearance. He was followed in his presentation and he is eminently skilled at courtroom presentations for the State. And to attack him I think would be fruitless and would most likely backfire.

The medical records that were introduced at the post-conviction hearing showed a pattern of emergency room visits by Marcrum, sometimes followed by longer hospitalizations, increasing in frequency from 1989 to 1993, always showing that Marcrum had not taken his Dilantin and had suffered seizures. The records show three major episodes in 1993. Many of these records showed bizarre, sometimes violent, behavior in conjunction with seizures and low medication levels. For instance:

> (1) On January 20, 1991, Marcrum was running naked in the streets, was combative and agitated, had seizures and reported that he had stopped taking his Dilantin a year ago.

(2) On April 12, 1992, Marcrum was kicking cars and chasing an elderly woman and child down the street. He stated that he was talking to the radio about God. His Dilantin level was too low, and he reported a two-month history of non-compliance with taking his medicine. He was diagnosed as psychotic, but the psychosis cleared up when he was treated with a therapeutic level of Dilantin.

(3) On December 9, 1992, Marcrum was admitted after a seizure, with a sub-therapeutic Dilantin level. He was diagnosed with "schizophrenia, paranoid."

(4) On April 4, 1993, Marcrum was "acutely psychotic," having had seizures the past two days, with a "subtherapeutic anticonvulsant level."

(5) On November 16, 1993, he was admitted to the Southeast Missouri Mental Health Center after he "began striking and beating another individual" "without provocation," breaking the windshield out of a car. He was described as "violent, combative, and scream[ing]." His Dilantin level was sub-therapeutic. The examining psychiatrist described his "grandiose ideations" in which he claimed to have "a tremendous amount of power that he gets from Jesus with whom he maintains a good communication."

(6) On December 27, 1993, Marcrum was taken to the emergency room after being picked up for domestic violence. He was "combative and delusional." He was quoted

> as saying, "I killed the kids, I'm hitching to the lord and I'm taking a bunch with me, I don't kill unless the lord tells me he needs them." He was reported to have not been taking his medication for the past week.
>
> (7) On March 12, 1994, Marcrum was taken to the emergency room for a seizure; he was combative and his Dilantin level was subtherapeutic.

The medical records from the night after the killing, also introduced at the post-conviction hearing, showed that Marcrum was brought to the hospital for bizarre behavior. When he arrived, he was whispering, "I am the chosen one." A blood test for phenobarbital, an anti-convulsant, showed the level was far below therapeutic. The doctor wrote that Marcrum was in "florid psychosis" and ordered that he be given 500 mg. Dilantin "NOW."

The state trial court considering Marcrum's post-conviction proceeding rejected Marcrum's argument that his lawyer had ineffectively presented his mental disease defense. *Marcrum v. State of Missouri,* No. CV198-1317-CC-JI (Mo. Cir. Ct. May 18, 2000). The court held that counsel had acted reasonably in employing Dr. Barclay, based on Barclay's credentials and performance as a witness in past cases. Since Barclay's testimony "went to establishing the defense of not guilty by mental disease or defect and that of diminished capacity," counsel was not obliged to shop for another doctor, even if the second doctor would reach that conclusion by "different diagnosis and

different nomenclature." The court further accepted Speer's testimony that the medical records would have been cumulative and repetitive and would have lengthened the trial to Marcrum's detriment. The court rejected the argument that Speer should have cross-examined Parwatikar, concluding that such cross-examination "would [not] have presented a viable defense," that Marcrum failed to demonstrate what Parwatikar would have said on cross-examination, and that Speer had valid reasons not to prolong the trial by cross-examining the state's expert.

Marcrum appealed the denial of post-conviction relief to the Missouri Court of Appeals, which also rejected the claim that counsel failed to present the mental disease or defect defenses adequately. *Marcrum v. State of Missouri,* No. ED 77956, slip op. at 3-4 (Mo. Ct. App. May 22, 2001). The Court of Appeals listed three grounds for rejecting Marcrum's claim that Speer failed to introduce information from his medical records through his expert. First, the Court of Appeals said that Dr. Barclay's testimony at trial had actually covered the facts that Marcrum did not take his medicine, that he had frequent seizures,[2] that he was admitted to the hospital the night of the killing, and that he accused his mother of poisoning

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[2] The Missouri Court of Appeals stated that there was evidence at trial that Marcrum had "multiple seizures the day of the attack." Actually, the evidence was that he had had seizures in the days leading up to the attack.

him. The Court of Appeals concluded that the omitted records would not add to what was already before the jury. Second, according to the court, there were legitimate strategic reasons for declining to put in certain evidence relevant to Marcrum's psychosis, such as his violence, his alcohol abuse and his belief that Reeves was evil, since these facts could have prejudiced the jury against Marcrum. *Id.* at 4. Third, some of the facts that Marcrum contended should have been brought out from the medical records at trial were not simply the facts from the records, but involved an interpretation of those facts that was different from Barclay's interpretation. The Missouri Court of Appeals held that Marcrum could not impeach his own expert "under the guise of a claim of ineffective assistance of counsel." *Id.*

Even assuming that any of the actions Marcrum complained about constituted deficient performance, the Court of Appeals held that there was substantial evidence that Marcrum was sane at the time of the killing and that therefore any deficiency did not prejudice Marcrum. *Id.* at 5.

The Court of Appeals also held that it was not unreasonable for Speer not to cross-examine Parwatikar because the assertions Parwatikar made on direct examination reflected Parwatikar's professional opinion. *Id.* at 6. Implicitly, the court doubted that Parwatikar would have conceded that there was anything doubtful or incorrect about his testimony on direct. Moreover, the Court held that cross-examination of Parwatikar could have "backfired"

because it might have made Parwatikar's testimony even more convincing to the jury. *Id.*

C. Habeas proceedings in the district court.

Marcrum filed this habeas proceeding, contending that Speer's assistance was ineffective for failure to introduce Marcrum's "voluminous records of mental illness," and in particular, the records from the night of June 3 showing his anticonvulsant level was far below therapeutic range and he was diagnosed as suffering from "florid psychosis."

The district court held it was not a reasonable strategy for counsel to fail to introduce these records on the ground that they were cumulative and would bore the jury. *Marcrum v. Luebbers,* No. 4:02CV01167 AGF, slip op. at 35 (E.D. Mo. Sept. 30, 2005). Moreover, trial counsel appeared to think he had introduced at least some of the records, when in fact he had not introduced them. *Id.* at 36. Specifically, the district court held that the evidence in the records about the connection between Marcrum's past psychotic episodes and violent behavior was crucial to his case, especially because both experts at trial and Marcrum himself had said that Marcrum was not violent during his psychotic episodes. Further, the evidence showing that Marcrum became psychotic when his anti-convulsant level was too low was also crucial. The district court rejected the idea that testimony about Marcrum's past psychiatric episodes

from his friends and family was an acceptable substitute for evidence taken from hospital records. The district court also held that it was unreasonable not to cross-examine Dr. Parwatikar when he said that Marcrum's records showed no history of violent conduct in connection with Marcrum's psychiatric crises, whereas the medical records showed that there was such a connection. *Id.* at 37.

The district court also held unreasonable the state courts' conclusions that there was no prejudice to Marcrum from his counsel's failure to introduce the medical records and to impeach Parwatikar with the inconsistency between the facts disclosed in the records and his opinion that there was no connection between Marcrum's psychosis and his violent behavior. The district court reasoned that the state courts relied on record evidence tending to show that Marcrum was sane during the killing, but that this evidence "came solely" from Parwatikar and would have been significantly undercut by introducing the records and demonstrating that Parwatikar's testimony was inconsistent with them. *Id.* The district court conducted its own prejudice analysis and found that, while evidence that Marcrum committed the killing was overwhelming, evidence that he was sane at the time and able to deliberate was not. The evidence that he was sane and able to deliberate was mostly from the tape demanding money, which was made seven years before the killing and was therefore not very probative of Marcrum's sanity or ability to deliberate on the day at the time of the killing. *Id.*

Having concluded that Marcrum received ineffective assistance of counsel in connection with presenting his insanity and diminished capacity defenses and that the state courts' conclusions to the contrary were objectively unreasonable, the district court granted Marcrum's habeas petition. *Id.* at 40. The court stayed its order pending this appeal.

Before moving to the merits of this case, we observe that the Superintendent contends that this petition is barred by the one-year statute of limitations for habeas petitions, 28 U.S.C. § 2244(d)(1). The Superintendent contends that the statute of limitations began to run fifteen days after Marcrum's direct appeal was decided by the Missouri Court of Appeals, whereas the district court counted the time beginning 90 days after the Missouri Court of Appeals' decision. *Marcrum v. Luebbers,* No. 4:02CV01167 AGF, slip op. at 3 (E.D. Mo. Sept. 11, 2003). The case of *Riddle v. Kemna,* No. 06-2542, which involves the same question concerning the running of the statute of limitations, is now pending before our court en banc. In view of our disposition of the merits of this case, we need not resolve the question of whether the petition was timely filed.

II.

In habeas corpus proceedings, we review the district court's findings of fact for clear error and its conclusions of law de novo. *Garcia v. Bertsch,* 470 F.3d 748, 752 (8th Cir. 2006), *cert. denied,* 127 S. Ct.

2937 (2007). Ineffectiveness of counsel claims present mixed questions of law and fact, which we review de novo. *Id.* at 754. That said, in a habeas case alleging ineffective assistance of counsel, we are bound to view what happened at trial through two filters, the first requiring us to defer to judgments of trial counsel, *see Strickland v. Washington,* 466 U.S. 668, 689 (1984), and the second requiring us to defer to the state courts' application of federal law to the facts of the case, *see Bell v. Cone,* 535 U.S. 685, 698-99 (2002). Taking into account the leeway given to counsel under the *Strickland* standard and that given to the state courts under 28 U.S.C. § 2254(d), we conclude that Marcrum did not show he was entitled to the writ of habeas corpus.

A.

The Sixth Amendment guarantees the right of the accused in criminal prosecutions to "the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[T]he right to counsel is the right to effective assistance of counsel." *Kimmelman v. Morrison,* 477 U.S. 365, 377 (1986). Effective assistance is representation that "play[s] the role necessary to ensure that the trial is fair." *Strickland,* 466 U.S. at 685. To show a constitutional violation of the right to counsel a convicted defendant must show first, that counsel's performance was deficient, *id.* at 687, and second, that counsel's errors prejudiced the defense, *id.*

The test we apply for deficiency of performance is an objective standard of reasonableness. *Id.* at 688. In *Strickland,* when the Supreme Court pronounced this standard, it expressly declined to dictate detailed rules for deciding reasonableness: "More specific guidelines are not appropriate." *Id.* However, *Strickland* gave us several guides to decision: we must assess reasonableness on all the facts of the particular case, we must view the facts as they existed at the time of counsel's conduct, and we must evaluate counsel's performance with a view to whether counsel functioned to assure adversarial testing of the state's case. *Id.* at 690. Moreover, the reasonableness of counsel's actions may depend on his client's wishes and statements. *Id.* at 691; *see Schriro v. Landrigan,* 127 S. Ct. 1933, 1941 (2007) (client's statement to court that he did not wish to present mitigating evidence supported state court finding of no prejudice from counsel's failure to investigate such evidence). A court considering a defendant's attack on his conviction must be "highly deferential" in assessing whether counsel's course of conduct could be considered a sound trial strategy rather than an error, *Strickland,* 466 U.S. at 689, and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* In other words, the burden of proof is on the petitioner to show that "his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman,* 477 U.S. at 384.

The Supreme Court has held in several cases that the habeas court's commission is not to invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened; when a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action.[3] *Rompilla v. Beard,* 545 U.S. 374, 395-96 (2005) (O'Connor, J., concurring); *Wiggins v. Smith,* 539 U.S. 510, 526-27 (2003); *Kimmelman,* 477 U.S. at 385. For instance, in *Kimmelman,* the Supreme Court held that counsel's performance was deficient when his failure to file a timely motion to suppress a bed sheet seized in a rape case was due not to strategic considerations, but to counsel's ignorance that the state had the bed sheet and intended to introduce it. Counsel had failed to

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[3] The recent *Landrigan* case is not to the contrary, despite the Supreme Court's reversal of a Court of Appeals decision granting an evidentiary hearing on a habeas claim based on a failure to investigate theory. In *Landrigan,* at sentencing, the client had announced that he did not wish to present any evidence of mitigation. The Ninth Circuit said that the client's last-minute decision not to testify could not excuse counsel's earlier failure to investigate mitigating circumstances. The Supreme Court reversed the Ninth Circuit's grant of an evidentiary hearing, but it did not hold that the client's decision made reasonable counsel's earlier failure to investigate. Instead, the Supreme Court held that the client could not show he was prejudiced by the failure when he himself later decided not to present mitigation evidence. 127 S. Ct. at 1942.

learn of the sheet because counsel mistakenly believed that the state would turn all incriminating evidence over without the need for counsel to conduct discovery. 477 U.S. at 384-85. The warden's arguments that the bed sheet did not turn out to be as important as other aspects of the case did not justify counsel's failure to learn of the bed sheet or respond to it. The Supreme Court held that counsel's decisions had to be evaluated as of the time they were made, and counsel who conducted no discovery could not have known what the relative importance of the different kinds of evidence would be. *Id.* at 386-87. Similarly, in *Wiggins,* the Court held counsel's actions were deficient, despite proffered strategic justifications: "[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." 539 U.S. at 526-27.

If, viewed with appropriate deference, counsel's performance was in fact deficient, the convicted defendant will only be entitled to relief if he shows there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The reviewing court must not consider the attorney error in isolation, but instead must assess how the error fits into the big picture of what happened at trial. *Id.* at

696. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*

B.

The federal statute for habeas review of state convictions was overhauled in 1996, in the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218, now universally known as AEDPA. An important effect of AEDPA was to modify the standard by which we review state courts' earlier decisions in a case. Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, **or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States**; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination

> of the facts in light of the evidence presented in the State court proceeding.

(emphasis added).

Section 2254(d)(1), which governs legal determinations, has two clauses, the "contrary to" clause and the "unreasonable application" clause. Because the state courts correctly identified the governing legal rules in Marcrum's case,[4] only the "unreasonable application" clause (highlighted in the quotation above) concerns us here. "A run-of-the mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams v. Taylor,* 529 U.S. 362, 406 (2000). Such a decision could, however, involve an "unreasonable application" if the court identified the correct legal rule but unreasonably applied it to the facts of the case before it. *Id.* at 407-09 (reserving question of whether the "unreasonable application" clause could also apply where state court unreasonably extends or fails to extend established legal principle to new context).

Although the Supreme Court has not found it necessary to refine the meaning of "unreasonable application," *see Yarborough v. Alvarado,* 541 U.S. 652, 663-64 (2004) ("The term unreasonable is a

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[4] The governing legal principles are drawn from Supreme Court jurisprudence as of the time the state court rendered its decision. *Yarborough v. Alvarado,* 541 U.S. 652, 660-61 (2004).

common term in the legal world, and accordingly, federal judges are familiar with its meaning.") (internal quotation marks omitted), the Court has established that the standard does not require that all reasonable jurists would agree that the application was unreasonable, *Williams,* 529 U.S. at 409-10, and that it requires something more than clear error, *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003). Unreasonableness is judged by an objective standard. *Yarborough,* 541 U.S. at 665. The more general the applicable legal rule or principle, "the more leeway courts have in reaching outcomes in case-by-case determinations," *Yarborough,* 541 U.S. at 664, and consequently, the more difficult it is to say that the state court's application of such a rule or principle is objectively unreasonable. As we discussed above, in *Strickland,* the Supreme Court expressly determined that the ineffective assistance standard should be left as a general principle, not a set of specific rules, 466 U.S. at 688, which suggests that it would be rare for the Supreme Court to hold a state court's application of *Strickland* to be unreasonable. *See Rompilla,* 545 U.S. at 381 ("A standard of reasonableness . . . spawns few hard-edged rules. . . ."). However, the Supreme Court has recently made clear that "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman,* 127 S. Ct. 2842, 2858 (2007).

Nevertheless, the Supreme Court has held on three occasions that state courts' applications of *Strickland* were unreasonable under the AEDPA and

that prisoners were entitled to the writ of habeas corpus because they received ineffective assistance of counsel. *Rompilla,* 545 U.S. at 380, 393; *Wiggins,* 539 U.S. at 520, 538; *Williams,* 529 U.S. at 399; *see* John H. Blume, "AEDPA: The 'Hype' and the 'Bite,'" 91 *Cornell L. Rev.* 259, 279-80 nn.105-107 (2006) (noting that before the AEDPA, Supreme Court never held counsel ineffective under *Strickland,* whereas Court has done so three times under the AEDPA). In each of these three cases, counsel had failed to present important aspects of the personal history of the defendant, and the failure had resulted from inadequate trial preparation. *Rompilla,* 545 U.S. at 389-92 (failure to look at file for prior conviction which showed parental abuse and alcoholism and would have pointed to defendant's organic brain damage); *Wiggins,* 539 U.S. at 524-25 (counsel failed to investigate or present evidence of childhood abuse); *Williams,* 529 U.S. at 395-97 (counsel failed to uncover records describing defendant's nightmarish childhood and borderline retardation). Though these cases were all death-sentence cases and Marcrum's is not, there is a good deal of similarity between the kind of omissions that led to relief in *Williams*, *Wiggins*, and *Rompilla* and those alleged by Marcrum. This string of cases shows that the AEDPA does not relieve us of the duty to scrutinize counsel's omissions and the state courts' assessments of counsel's omissions.

III.

A.

The evidence at the trial of this case revealed a serious possibility that on the day of the killing Marcrum was in the throes of a psychosis. The jury nevertheless rejected Marcrum's defenses of insanity and diminished capacity. However, that jury never saw or heard about medical evidence that, with scrutiny and analysis, could have shown a well-established pattern in which Marcrum failed to take his anti-convulsants, suffered from serial seizures, and fell into a psychosis in which his behavior was paranoid and violent. Nor did the jury see or hear about medical records from the night of the killing diagnosing Marcrum as psychotic and showing a sub-therapeutic level of anticonvulsant in his blood. The record shows that counsel's decisions about what medical records to introduce at trial resulted from neglect, not reasonable trial strategy. After scrutinizing the record from beginning to end, we conclude that introduction of the medical records themselves would not have been reasonably likely to have changed the jury's mind, *see Strickland,* 466 U.S. at 696 (asking whether decision would "reasonably likely" have been different absent attorney error). The records themselves could not have made the necessary causal connection between lack of anti-convulsants, serial seizures, organic psychosis, and violence. Only an expert who interpreted the records in a different way than the two experts who testified at trial could have made those records tell the story

that we now have before us. Because the law is well-established that a lawyer who hires a qualified mental health expert is not ineffective in relying on that expert's opinion unless the lawyer has reason to doubt the expert's competence,[5] we cannot say that Speer's decision to hire Barclay or to proceed to trial on the basis of Barclay's interpretation of the medical record fell below the standard of performance dictated by the Sixth Amendment. In sum, as we explain below, we conclude that Speer's decisions that may have fallen below the level of acceptable competence did not result in prejudice to Marcrum, and Speer's decisions about what expert to present did not fall below the level of acceptable performance.

B.

Marcrum contends that Speer's decision not to introduce the medical records into evidence resulted from negligence, not from defensible strategy. Supreme Court precedent shows that counsel's decisions resulting from failure to investigate are not entitled to the presumption of competent performance, whereas decisions about what to do with the results of investigation are strategic decisions that are virtually immune to second-guessing by habeas courts. *E.g., Wiggins,* 539 U.S. at 522-23, 527-28 (decision avoided focusing on counsel's decision of what evidence to present, which was strategic, but found

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[5] See discussion at pages 35-37, *infra*.

deficient performance because of inadequate investigation, which shaped strategic decision).

The record here shows that well in advance of trial, Speer was in possession of the medical records that Marcrum now relies on. Speer said at trial that he had received a "large bundle of information" when he took over the case from the public defender. Speer supplied those records to Barclay, and Barclay reviewed the records in examining Marcrum and formulating his opinion about Marcrum's state of mind at the time of the killing. Indeed, the record before us presents the medical records in sets, most of which are labeled: "Records of Alan [sic] Barclay, PhD from Missouri Baptist Hospital-Sullivan," "Records of Alan [sic] Barclay, PhD from Social Security Administration, Rolla," etc. Barclay testified at trial that he reviewed the medical records and Marcrum does not argue that the records Barclay had were incomplete. Therefore, whatever else Speer may have done wrong, this is not a case like the ones where the Supreme Court has found deficient performance because the lawyer failed to turn up the evidence in time to formulate a trial strategy. *See Rompilla,* 545 U.S. at 389-90; *Wiggins,* 539 U.S. at 524-25; *Kimmelman,* 477 U.S. at 385.

What Speer did do wrong was to fail to timely disclose as witnesses the doctors and other healthcare providers who had treated Marcrum in the past and who would have been able to testify about the contents of the records. As we discussed in the statement of facts, Part I B *supra,* Speer failed until well

into the trial to name Dr. Kim Young and Denise Hacker, who could have testified about Marcrum's records from severe episodes in November and December 1993, and Drs. Gedden and Viamontes, who treated Marcrum the night of the killing. The trial court excluded those witnesses because of Speer's neglect to comply with the pretrial order,[6] but the court endeavored to limit the damage to Marcrum's case by ruling that Speer could introduce the records through Barclay. However, at the post-conviction hearing, Speer said that he did not introduce the records because the court excluded them: "[T]here were some medical records I thought at one point we wanted to get in and because they were late arriving, the Court declined to allow them in." Speer offered his opinion that the records would not have been "at all helpful," but he did not say that this was his contemporaneous reason for failing to introduce them. The reason he gave for his failure to introduce the records was that the trial court excluded them, which though it may show that Speer misunderstood the details of the trial court's ruling, also shows that the failure was the result of a situation caused by Speer's neglect. Moreover, Speer also said that he had introduced some of the records, which he had not; this shows that the failure may have resulted in part from

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[6] Marcrum has not shown that the various treating doctors would have added anything to the information shown in the medical records; we therefore need not treat the failure to call the doctors as witnesses separately from the failure to introduce the records.

still another mistake, and, again, it shows that the failure was not the result of strategy. Upon prompting he also said that he was against "cumulative" evidence, but he obviously did not discard as cumulative the records that he wrongly believed he had entered into evidence or those that he tried to enter, but which he believed had been excluded for lateness. Furthermore, the trial transcript shows that Speer regarded the excluded treating doctors as crucial, since he argued to the trial court: "We need these people. They're essential to his defense of mental disease or defect." The law is clear that we must judge Speer's performance on facts as they appeared to him at the time of trial, not on whether he thinks in retrospect the action would have been advantageous or not. *Kimmelman,* 477 U.S. at 386-87. Thus, the reasons offered by Speer and the state courts why not introducing the records could have been strategic are irrelevant.[7] We need not reach the question of whether the state courts' reliance on such reasons was an unreasonable application of federal law, because we conclude that there was no prejudice from the failure to introduce the records.

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[7] The Missouri Court of Appeals also held that failure to introduce the medical records was no failure at all, since some of the facts that would have been in the medical records were entered through Barclay. This is not a complete answer on this issue, since certain highly relevant facts, e.g., the lab report of sub-therapeutic anticonvulsant levels on the day of the killing, were not addressed in Barclay's testimony.

C.

To obtain relief on the theory that Speer was ineffective for failing to introduce the medical records, Marcrum must show a reasonable probability that the failure to introduce the records affected the outcome of the trial. We have before us some seven hundred pages of medical records, much of it in illegible doctor's handwriting, much in the form of laboratory reports, couched in medical terminology that would mean almost nothing to a jury of lay people. Even if the notations had been read to the jury by the treating doctors, there is no reason to think the jury could have digested them and discerned a causal connection between lack of medication, serial seizures, psychosis, and paranoia and violence. Clearly, it is not the failure to introduce the records themselves that would have changed (or had a reasonable probability of changing) the outcome of the trial. It would have required a specific use of the records to have an effect on the jury.

Even if Speer had drawn the jury's attention to such notations in the record as "florid psychosis" on June 3, 1994, and the laboratory report showing a sub-therapeutic level of phenobarbital in Marcrum's blood that night, we conclude that there is no reasonable probability the jury would have found these items of evidence determinative.[8] The testimony of

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[8] Had the laboratory report been introduced, the State may have cast doubt on the relevancy since the test was for phenobarbital and Marcrum's usual anticonvulsant was Dilantin. The parties have not addressed this issue.

both experts at trial led the jury to believe that the psychosis occurred only in the immediate aftermath of a seizure and that Marcrum did not have a seizure at Reeves's house that day. Without an expert's opinion that the psychosis resulted from a series of seizures, not from a particular one, and that the psychosis would not resolve until Marcrum was medicated with anti-convulsants, the jury was not reasonably likely to piece together the medical records on its own to come to the conclusion that Marcrum's psychosis that night proved he was psychotic during the afternoon.

Barclay's testimony left the jury in doubt as to whether there was proof that Marcrum was psychotic on the afternoon of June 3, even assuming he was psychotic that morning and that night. On cross-examination, when the prosecutor asked whether Marcrum was "in the reality phase or in the loss of reality phase" on the day of the killing, Barclay said, "I can't testify to that because I was not present." On redirect, Barclay testified that he believed Marcrum was psychotic when he left home on June 3 and he was psychotic when he returned and that "it's part of a long-running pattern, those repeated seizures." Speer asked whether there was "a high degree of probability" that during the interim Marcrum was also psychotic, and Barclay answered, "I believe that would be consistent with a persistent psychotic state, yes." This was not a definitive rebuttal of his earlier admission.

Moreover, Barclay acceded to the prosecutor's insistence that there was a one-on-one relationship between seizures and psychotic episodes:

Q: The seizure is the trigger, isn't it?

A: Yes, the seizure is an event, right.

The prosecutor labored that point throughout the trial, and he drove it home on closing: "The seizure is the trigger, his own doctor said." This would have led the jury to think that unless there was a seizure at Reeves's house, which would have rendered Marcrum unable to wield a fireplace poker or drive home, there must have been no psychosis. In contrast, according to Dr. Logan, once the serial seizures leading up to June 3 had pushed Marcrum into organic psychosis, he would have stayed psychotic-violent and hyper-religious and able to hit people with pokers and still drive home – whether or not he had another seizure. Indeed, he would have stayed psychotic until he had a therapeutic level of anti-epilepsy medicine in his bloodstream.

The jury had no way to assess the significance of the medical records showing Marcrum had a sub-therapeutic level of anti-epilepsy drugs. There was some evidence in the record of the fact that Marcrum was off his medicine: Barclay mentioned at trial that Marcrum's seizure disorder appeared to be progressing over time, "partly as a result of his noncompliance with his medical regimen," and one of the ambulance drivers from the night of June 3 testified that Marcrum's family had told him that night that Marcrum

"hadn't been taking his Dilantin, which is an anti-seizure medicine, for two to three days." These comments were before the jury, but they were drops in an ocean of evidence, which the jury was not equipped to interpret as Logan later interpreted it. Both Barclay and Parwatikar, and for that matter, even the lay witnesses at trial, characterized the psychosis as something that was associated with the seizures, but the relation was never made clear. Some witnesses said the bizarre behavior happened before a seizure, some said it happened after. Speer himself said in his opening statement that Marcrum's seizures "don't necessarily have anything to do with psychosis. Sometimes, I believe the testimony will show, that sometimes one may precede the other or they may be entirely unrelated." Parwatikar expressly said the psychosis could clear up within two hours to two days, and he referred to it as "postictal psychotic period," which suggested that it only happened immediately after a seizure. The experts at trial never told the story Logan told: that lack of medicine led inexorably to multiple seizures to organic psychosis that would not clear until Marcrum had been medicated with anti-epilepsy medicine. Without that clear, causal explanation linking the medical observations into a story line, evidence that Marcrum had not been taking his medicine and that he was paranoid that morning or in "florid psychosis" that night did not prove Marcrum was insane at the time of the killing. With Barclay's and Parwatikar's testimony as the jury's expert guidance, introducing a lab result showing a low level of phenobarbital on June 3 or an

emergency room doctor's note of "florid psychosis" would not have appreciably changed the mix of evidence before the jury.

Nor would it have helped to impeach Parwatikar[9] for saying there was no evidence of any connection between Marcrum's psychosis and violent behavior.[10] Speer could have impeached Parwatikar with Parwatikar's own report that said, "[W]hen he becomes psychotic . . . [h]e becomes violent, running around the neighborhood without any clothes on, screaming and thinking people are trying to kill him, etc." Or Speer could have used medical records such as those from the December 1993 incident in which Marcrum was picked up for domestic assault, and taken to the

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[9] Because we decide that there was no reasonable probability that cross-examination of Parwatikar would have changed the result of the trial, we need not decide whether Speer's performance was deficient in declining to impeach an expert with contradictions between his testimony, on the one hand, and the medical records and his own report, on the other, for the alleged strategic reasons that the expert was "tall," "good-looking," "commanding," and "articulate" and that there was "no fruitful line of inquiry" on which to cross-examine him. Nor need we decide further whether the state courts unreasonably applied *Strickland* in holding that Speer's performance was not deficient in this regard.

[10] Q: Did you also find any history, either speaking to the Defendant or through his medical records, where his particular psychosis, which is triggered by the seizure, manifested through the seizure and the odd behavior, at any time also manifested itself with violent behavior?

A: No, sir.

emergency room, saying, "I killed the kids, I'm hitching to the Lord and I'm taking a bunch with me."

These tactics would have done no good because Barclay also agreed that there was no relationship between the "nonreality stage" and violence:[11]

> Q: Even during the previous seizure patterns, isn't it true that your report indicated that "these patterns are nonviolent in nature"?
>
> A: Yes.
>
> Q: And if we remember the seizure triggers that mental disease or defect to go into the nonreality stage. So that nonreality stage, based upon your report and your research, is nonviolent in nature, isn't it?
>
> A: Yes.

Again, Barclay said:

> Q: During the post-ictal stage, which means after the seizure, when he's saying he's God and he's Gordon Gundaker, that he's holding a book, a real estate book and thinks it's the Bible or whatever, you never found one violent episode in his past, did you?
>
> A: Not by a report, to the best of my knowledge, Counselor.

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[11] Marcrum himself agreed with the prosecutor that his "seizures . . . and aftereffects are passive, of a non-violent nature."

Neither of these experts said, as Logan said later, that the hallmark signs of Marcrum's psychosis were religious delusions and violence, so that the very evidence linking Marcrum to the killing (blood and the statement, "Praise the Lord, I just killed one son-of-a-bitch. . . .") would support the conclusion that he was insane at the time it happened. The record was not so clear that it could interpret itself. While the medical records themselves show that Marcrum was sometimes violent during his psychotic episodes, the evidence at trial indicated he was also violent at other times,[12] and the lay witnesses said not every episode of delusions and bizarre behavior led to violence.[13]

Perhaps the closest case from our Circuit factually is *Hill v. Lockhart,* 28 F.3d 832 (8th Cir. 1994), a pre-AEDPA death-penalty case. Hill's psychologist testified that Hill had chronic paranoid schizophrenia and that it "would be reasonable to assume" the

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[12] Recall Marilyn McManus's testimony: "There was times that he has drank and he has hit me and he has not had a seizure." The medical records also revealed violent behavior that had no documented link to low anticonvulsant levels or seizures, as for example, the record of June 30, 1990, when Marcrum was treated for injuries from a fist-fight, with no mention of seizure involvement.

[13] McManus said both that he could be "angelic" in an "aftermath" and that he could be violent. The medical records also revealed episodes of low medicine levels and seizures with no violent behavior, for instance, the record for August 13, 1993. His parents testified about his bizarre behavior, but they insisted he was not violent.

defendant was psychotic at the time of the killing. *Id.* at 841. He also said that paranoid schizophrenics often quit taking their medication. *Id.* at 842. What he did not say was that Hill had in fact missed an appointment to take his drugs about three weeks before the killing and so was unmedicated at the time of the killing. We found counsel's performance deficient for failing to raise the "obvious" defense that Hill was insane because of failure to take his drugs. *Id.* at 842. However, in light of other evidence that Hill abused drugs and alcohol before the killing, we held that Hill did not prove prejudice so as to require vacatur of his conviction (although he did prove prejudice in connection with proving mitigating factors for the death penalty). Thus, despite our conclusion that the jury never heard the best reason for finding Hill insane at the time of the killing, we did not vacate the conviction. The enactment of the AEDPA after *Hill* was decided would make Hill even less entitled to relief under current law. Thus, *Hill* does not point clearly either way on whether there was prejudice in this case.

We conclude that, without expert testimony such as Logan's, linking the lack of anti-epilepsy medicine to an organic psychosis, marked by violent behavior and religious delusions, that would not resolve until Marcrum had received a therapeutic dose of medicine, it would not have helped appreciably for Speer to introduce the medical records and cross-examine Parwatikar. The defect at trial was not lack of primary evidence, it was lack of an interpretation. It

was not objectively unreasonable for the Missouri Court of Appeals to find that Marcrum suffered no prejudice from Speer's failure to introduce the medical records or cross-examine Parwatikar.

But this conclusion simply delays getting to the heart of the matter: if the medical records and the cross-examination would not have been reasonably likely to change the result of the trial without expert testimony like Logan's testimony at the post-conviction hearing, was it ineffective for Speer to fail to come up with a Dr. Logan or someone else who would have testified to the same theory? No one disputes that Dr. Barclay was qualified or that he took sufficient time and trouble with Marcrum. He was a Ph.D. clinical psychologist from a prestigious university, with graduate training in psychopathology and impressive professional credentials, who has practiced extensively. *See* Mo. Rev. Stat. §§ 552.020, 632.005(19) (requiring evaluation of certain defendants by psychiatrist or psychologist or by physician with one year experience in treating retarded or mentally ill patients), and § 337.021 (educational criteria for licensure satisfied by doctoral degree in psychology and one year of practice). Barclay examined Marcrum, tested him, interviewed members of his family, and reviewed statements of the police and extensive medical records given to him by Marcrum's lawyer. Barclay estimated he had spent between 12 and 20 hours on Marcrum's case.

Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity

and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion. *Sidebottom v. Delo,* 46 F.3d 744, 753 (8th Cir. 1995); *Six v. Delo,* 94 F.3d 469, 474 (8th Cir. 1996), *abrogated on other grounds, Smith v. Bowersox,* 311 F.3d 915, 918 n.2 (8th Cir. 2002). The fact that a later expert, usually presented at habeas, renders an opinion that would have been more helpful to the defendant's case does not show that counsel was ineffective for failing to find and present that expert. *See, e.g., King v. Kemna,* 266 F.3d 816, 824 (8th Cir. 2001) (en banc); *Sidebottom,* 46 F.3d at 753. Admittedly, we have found ineffective assistance in the sentencing phase of a death case where counsel failed to look for a second expert opinion after a cursory first examination (twenty minutes) produced an expert's opinion which did not fit with the facts as known to counsel, *Antwine v. Delo,* 54 F.3d 1357, 1368 (8th Cir. 1995). But there was no cursory examination here, where Barclay spent 12-20 hours working on Marcrum's case. The very fact that Barclay's interpretation of the record was consistent with Parwatikar's would have given Speer every reason to believe that both experts were making a correct analysis of the medical records.

Nor would it necessarily have been obvious to Speer, the layman, that he should contend that there was a link between Marcrum's psychosis and violence, when both the experts said there was not. The record is not so crystal clear that Speer was on notice

that his expert was missing something. As we noted above, there was evidence in the record of violent behavior even when Marcrum was not psychotic and not every episode of bizarre behavior resulted in violence. Even if Logan's interpretation of the record makes a more coherent story and a story that would have been more likely to produce an acquittal, this does not necessarily mean that Barclay's interpretation was wrong or that Speer was wrong to rely on it. Far less could we say that the state courts were unreasonable in holding Speer's representation was constitutionally acceptable. *See Ringo v. Roper,* 472 F.3d 1001, 1006 (8th Cir.), *cert. denied,* 128 S.Ct. 445 (2007).

We cannot conclude that Marcrum has proved that his constitutional right to counsel was violated and that the Missouri courts were unreasonable in finding to the contrary.

IV.

Marcrum argues that we should affirm on the alternative ground that Speer was ineffective in failing to object to the prosecutor's personalization in closing argument. The district court held that there was no reasonable probability that the outcome of the trial would have been different if Speer had objected, and we agree there is no such probability.

Marcrum also contends that Speer was ineffective in failing to file Marcrum's new trial motion in time. He contends that this constituted deprivation of

counsel at a critical stage, thus entitling him to relief even without proving he suffered prejudice. Speer's mistake in failing to file the motion on time was just that – a mistake by counsel, not a deprivation of counsel. Marcrum must therefore prove prejudice. *See Bell v. Cone,* 535 U.S. 685, 697-98 (2002). As the district court held, he showed none, since the Missouri Court of Appeals considered his arguments for new trial at the post-conviction stage and held none of the arguments would have prevailed.

* * *

While habeas counsel has done a commendable job in presenting this difficult case and the district court's analysis was thorough and thoughtful, we ultimately must conclude that Marcrum was not denied his right to effective assistance of counsel at trial. It follows that the state courts did not unreasonably apply established federal law in reaching the same conclusion. Accordingly, the judgment of the district court must be and is reversed.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

RICHARD LOUIS MARCRUM,	)	
Petitioner,	)	Case No.
vs.	)	4:02CV01167 AGF
AL LUEBBERS,	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the petition of Missouri state prisoner Richard Marcrum for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] For the reasons set forth below, habeas relief shall be granted on the ground that trial counsel rendered constitutionally ineffective assistance in failing to competently present diminished-capacity and insanity defenses.

Petitioner was convicted by a jury in the Circuit Court of Jefferson County, Missouri, of first-degree murder and armed criminal action, arising out of the June 3, 1994 murder of Kenneth Reeves. Petitioner was sentenced to a term of life imprisonment without the possibility of parole, and life imprisonment,

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[1] The parties have consented to the exercise of authority by the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c).

respectively. The Missouri Court of Appeals affirmed Petitioner's convictions and sentences. His motion for post-conviction relief was denied by the trial court, and this denial was affirmed on appeal.

In the present habeas action, Petitioner claims that his constitutional right to the effective assistance of trial counsel was violated due to counsel's failure to (1) competently present insanity/diminished-capacity defenses; (2) object to the state's improper closing argument; and (3) file a timely motion for a new trial and thereby preserve trial errors for appeal.

By Order dated September 11, 2003, this Court rejected Respondent's argument that the petition in this case was time-barred. Doc. #23. Respondent now argues that habeas relief should be denied because the state courts' adjudication of Petitioner's claims did not involve an unreasonable application of federal law or an unreasonable determination of the facts.

BACKGROUND

Petitioner, who was 30 years old at the time, was arrested on the day of the murder and was initially represented by a public defender. On December 7, 1994, retained counsel, Alfred Speer, entered his appearance, and on December 29, 1994, counsel filed a notice of intent to rely on a defense of a mental disease or defect. Trial commenced on June 3, 1996.

Evidence at Trial

The sufficiency of the evidence is not at issue. The evidence presented at trial established the following: On June 3, 1994, the Rev. Kenneth Reeves, who was in his early 60s and had been a paraplegic for about two years, was battered with a fire poker in his home, and died two days later as a result. At noon on the day of the attack, Petitioner's car was observed in front of the victim's home. At approximately 2:30 p.m., the car was still parked there, and Petitioner was seen standing next to it. Neighbors of the victim were driving by and pulled up alongside Petitioner and asked if they could help him. Petitioner responded, "Praise the Lord, I just killed one sorry son-of-a-bitch and I will get another." When asked to repeat what he had said, Petitioner did so. Tr. at 196-213.

The neighbors left, but returned shortly to find that Petitioner and his car were gone. Upon entering the victim's home, they found the victim laying on the floor next to his overturned wheelchair, breathing heavily and bleeding from his head. A broken fire poker with blood on it was near the door, and blood was splattered throughout the room and pooling under the victim. Tr. at 213-24. The victim was admitted to the hospital with multiple lacerations of the skull, a depressed skull fracture (pieces of the skull driven into the brain), and cerebral contusions. He died two days later. Tr. at 376-77. The autopsy established that the cause of death was blunt trauma to the head, that the injuries were consistent with

having been struck by a fire poker at least three times, and the death was a homicide. Tr. 286, 304-06.

Petitioner's parents and brother testified that Petitioner lived with his parents at the time of the attack. He had had a series of seizures on the day before the murder, and on the morning of the murder had accused his mother of trying to poison him and left the house at about noon. He returned home at about 5:00 p.m., saying that he was God and was going to take people to the kingdom of heaven. Tr. at 791-804. Petitioner then went out on the sidewalk in front of the house and began quoting from the "Bible," which was actually a real estate magazine. His parents brought him back inside and called an ambulance. Tr. at 964.

At 8:40 p.m., paramedics were dispatched to Petitioner's home for "a possible violent psych case." One of the paramedics testified that upon arrival, Petitioner's mother told them that Petitioner had been drinking and had been off his Dilantin for two or three days. Petitioner appeared dazed, and the paramedic attributed this to alcohol. Tr. at 941-49. The court read a stipulation to the jury stating that a blood test performed on Petitioner at the time of his admittance to the hospital indicated that Petitioner had a blood alcohol content of 0-10 milligrams per

deciliter.[2] Tr. at 1063. The import of this number was not related to the jury, although during closing argument defense counsel stated that it showed that Petitioner was not intoxicated at the time.

Meanwhile, the victim's wife named Petitioner as someone she thought might have been the attacker, and several police officers and one of the neighbors who had spoken to Petitioner earlier in the day went to Petitioner's home. The neighbor identified a car parked in front of Petitioner's home as the one he had seen earlier that day in front of the victim's house. When the officers were informed that Petitioner had been taken to the hospital, they proceeded there and found Petitioner. One of the officers identified himself, at which point Petitioner stated, "I know why you're here, it's because of George. I killed George. I killed George. I killed George in Kimmswick. He also goes by the name of Kenny Reeves." Tr. at 405-09. Petitioner also stated that the victim "was a bad man and that he deserved to be killed because he was evil and it would be found out that he was evil." Tr. at 410. The officers arrested Petitioner and seized his clothing. DNA analysis showed that splatters of blood on the clothing were consistent with the victim's blood. Tr. at 410-12, 505. In the car on the way to the Sheriff's Department, Petitioner stated that he had no problem going to Hillsboro, but he did not want to

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[2] Blood alcohol content is the measure of the weight of alcohol in milligrams compared to a given volume of blood, usually in deciliters.

go to Kimmswick because he had done something bad in Kimmswick, and that it was going to be alright when everything came out because Kenny Reeves was a bad man. He also stated that he had been molested when he was younger. Tr. at 415.

Over defense counsel's objection, the prosecutor was permitted to play an audiotape of a rather lengthy phone conversation between Petitioner and the victim's wife. The conversation apparently took place approximately seven years before the murder, although the time frame is never made clear. Tr. at 11, 548, 579. In the conversation, Petitioner asked for $110 and said that unless it is given to him, he would expose that the victim and his wife are both gay, and that the victim had had sex with a 14-year-old boy. The victim's wife made only two statements during the conversation. She said "There is no money" repeatedly, and occasionally asked Petitioner if he was making a threat. Petitioner stated several times that he was not making any threats, but that he had a feeling that something was going to happen to the victim (implying that he would be arrested for the alleged molestation of the 14-year-old boy). At one point, however, Petitioner stated that he was making a threat, and that he would "stomp" the victim the next day in church. Toward the end of the conversation, Petitioner stated that if something happened to him, he would have the victim's house burned down

with the victim and his wife in it. Attachment to Resp. Ex. D.[3]

Petitioner testified at trial that he had known the victim for ten years and had had a sexual relationship with him throughout that time. Petitioner further testified that over this time period the victim gave him $90,000, bought a washing machine for Petitioner's parents, and bought Petitioner four cars. Petitioner testified that the victim had provided religious and psychological counseling, including psychohypnosis, for him on various matters. Petitioner testified that he and the victim drank together almost every time they met. He testified that he knew nothing about the murder, and that he could not remember that day at all. Petitioner testified that to his knowledge, he was not violent after his seizures, nor had he been told that he was. Tr. at 627-719.

Petitioner's mother testified that Petitioner had begun having mental health problems when he was eight years old. He had been treated in multiple hospitals and put on medication. When he was about 20 years old, Petitioner suffered a head injury from a car accident that caused a change in his behavior, so that "he didn't know what he was doing half the time anymore," and would run around saying people were

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[3] In the record, the tape is referred to as 90-minutes long and as including more than one conversation. The transcript of the tape in the record before the court only records one conversation, which the court estimates would have lasted approximately 25 minutes.

trying to kill him. Petitioner's mother testified that she first met the victim about six years prior to the murder, that the victim and Petitioner saw each other three or four times a week, and that the victim gave Petitioner several presents over the years, including $5,000 in the month before the murder. Tr. 796-801.

Petitioner's mother testified that after the car accident Petitioner began having seizures and passing out, and that his problems and behavior got increasingly worse over the years. She testified that she had taken Petitioner to almost every hospital in the city for treatment. He would typically be tied to a gurney, given Dilantin (an antiepileptic drug), and released when he calmed down. During these episodes, Petitioner often thought that he was God, and he would not know his name or who his family members were. Tr. at 793-808.

Petitioner's mother testified that when Petitioner came home on the day of the murder, he was wild-eyed, and that he thought he was God, taking some people to the kingdom of heaven. She further testified that she did not see any blood on his clothing. Tr. at 809-812. Petitioner's father and brother each offered substantially similar testimony. Tr. at 881-913, 952-63. Each family member testified that Petitioner had not been violent towards them during a seizure or otherwise.

Petitioner's former girlfriend testified that Petitioner had been violent toward her after a seizure, six months before the murder. On that occasion, she

pointed at him and told him to go to bed, and he grabbed her arm, twisted it, and swung it so that it hit the sink. She filed a complaint with the police, leading to Petitioner's arrest. She also testified that Petitioner's seizures and behavior had steadily gotten worse over the seven years that she knew him. The former girlfriend testified that Petitioner had beaten her in the past when he had been drinking, and that sometimes the drinking caused seizures and afterwards he would not remember having hit her. She also testified that other than the incident occurring after the seizure that led to Petitioner's arrest, he was not violent towards her when he had not been drinking. Tr. at 1011-37.

The police officer who arrested Petitioner on the domestic abuse charge testified that Petitioner identified himself as God to the officer and told him that he "abducted the children" and stated, "I'm sorry I molested them, I did not mean to kill her but I am the promise," and "I am the promise and the children come unto me to the palace and they do construction work." Petitioner violently resisted arrest, requiring three police officers to subdue him. Tr. at 774-89.

Expert Mental-Health Evidence

Prior to trial, defense counsel disclosed the name of Dr. Allan Barclay, a clinical psychologist, as an expert witness with regard to Petitioner's mental capacity defense. The State named Dr. Sam Parwatikar, a psychiatrist certified in neurology and forensic

psychiatry, as its mental health expert. Several days before trial, as well as during the trial itself, defense counsel named approximately 12 new witnesses he intended to call, including Denise Hacker, a social worker at the mental health facility where Plaintiff had been treated in late 1993; Dr. Young Kim, a psychiatrist at the same facility; and Drs. Eric Genden and Jorge Viamontes, who were on duty at the hospital to which Plaintiff was brought on the day of the murder. The prosecutor objected to allowing these witnesses to testify due to their late endorsement. In explaining the reason for the late endorsement, defense counsel stated that he thought the names of Ms. Hacker and Dr. Kim had been given to the prosecutor by the Public Defender earlier in the case, and that he had had a hard time locating Drs. Genden and Viamontes. Tr. at 608-16; 757-62; 840-49; 856-57.

The trial court sustained the State's objection to having these witnesses testify, but ruled that Petitioner could use the related medical records during Dr. Barclay and Dr. Partiwakar's testimony, "for whatever purpose." Tr. 874-77. In fact, during trial defense counsel did not refer to any medical records documenting Plaintiff's mental problems.

Petitioner's Medical Records

The record before the Court includes the following medical reports, among others, about Petitioner's mental problems:

(1) April 12-21, 1992, Malcom Bliss Mental Health Center

This report relates that on April 12, 1992, Petitioner was picked up by police and taken to the emergency room after he chased an elderly female and a child on the street and was observed kicking cars. He was admitted to the hospital on an involuntary basis. At that time, Petitioner had not been complying with his medication. Progress notes from April 14 state that Petitioner was exhibiting "bizarre behavior and physical aggression." The report states that Petitioner's confusion and psychotic symptoms cleared up after a therapeutic Dilantin level was achieved. The report also notes that Petitioner did not recollect having chased anyone prior to admission. Resp. Ex. Q at 26-110.

(2) December 9, 1992, Malcom Bliss Mental Health Center

On December 9, 1992, Petitioner was transferred to the state mental hospital after being brought to another hospital complaining of seizures. Petitioner attacked a male staff member without reason, and was then placed in leather restraints for several hours and medicated with Dilantin. Resp. Ex. Q. at 14-21.

(3) November 16-26, 1993, Southeast Missouri Mental Health Center

On November 16, 1993, Petitioner was taken to the emergency room by police for psychological treatment after damaging a police car while trying to break its windshield. According to accompanying court papers, Petitioner, without provocation, began striking and beating another individual. During the assault, Petitioner reportedly became "violent, combative, scream[ed], yell[ed]," and then became suddenly calm and quiet. Petitioner was brought to the hospital in handcuffs. When the handcuffs were removed, he began beating the walls with his fist, yelling and threatening the medical staff. Petitioner was immediately sedated and given Dilantin and Thorazine (an antipsychotic drug used for the treatment of schizophrenia). The medical records report that when Petitioner would stop taking his medication, his condition exacerbated and his aggressive behavior became paramount. He was described as having "questionable judgment," "poor impulse control," and "frequent temper outbursts." Resp. Exs. N. and O.

(4) December 27-28, 1993, Phelps County Regional Medical Center

On December 27, 1993, following the domestic violence arrest related at trial, Petitioner was taken to the hospital by the police. The medical records describe him as angry, combative, delusional ("I killed the kids . . . I don't kill unless the Lord tells me he

needs them;" "I'm doing the Lord's work"), and homicidal. He was placed in leather restraints and given Dilantin, Thorazine, and Lorazepam (an antianxiety drug also used to treat epilepsy). Resp. Ex. N.

(5) March 12, 1994, Barnes Medical Center

This report states that Petitioner was admitted to the emergency room with a right frontal hematoma and confusion. Petitioner was physically and verbally combative. He was placed in leather restraints and given Dilantin. Resp. Ex. P.

(6) June 3, 1994, St. Louis Regional Medical Center

The hospital records from the day of the murder show that Petitioner's medication level was significantly below therapeutic level. The admitting physician noted that Petitioner was "alert, not oriented to person/time/place," and diagnosed Petitioner with "florid psychosis." Petitioner was given Dilantin and Thorazine. Resp. Ex. M.

As noted above, none of these reports or their contents were referred to by defense counsel during trial.

Dr. Barclay's Testimony

Dr. Barclay testified for the defense. He testified that in diagnosing Petitioner, he relied upon reports from psychologists, psychiatrists, hospitals, and the

police, as well as upon his interviews with lay witnesses and Petitioner. Dr. Barclay had met with Petitioner on March 24 and April 28, 1995, and performed the Wechsler Adult Intelligence Scale Revised, the Wechsler Memory Scale, the Minnesota Multiphasic Personality Inventory, the Rorshacht Projective Test, and the DES Scale. Tr. at 1152-57, 1181. Dr. Barclay testified that the results of these tests revealed that Petitioner had a full scale IQ of 76 (lower borderline range); that his short-term memory was impaired; that he had periods of amnesia; and that there were times when Petitioner was not fully in contact with reality, possibly due to psychotic episodes. Tr. at 1162-69, 1181-82. Specifically, Dr. Barclay diagnosed Petitioner with "an organic personality disorder subsequent to the seizure disorder and the history of substance abuse in the past and the trauma that [Petitioner] experienced." Tr. at 1185.

Dr. Barclay opined that Petitioner suffered from a mental disease or defect, and that he was suffering from said defect on June 3, 1994, the day of the murder. Dr. Barclay stated that the mental defect would have "compelled" Petitioner to act or not act in a certain way on the day of the murder. In addition, the "retrograde amnesia" associated with the seizure disorder could have prevented Petitioner from remembering the events in question. Dr. Barklay testified that the combination of Petitioner's limited mental ability, seizure disorder, and organic personality disorder "would have precluded the logical, rational approach, the planning of any kind of activity"

or "[calmly] thinking about something and carrying it out." Tr. at 1203-1207.

During cross-examination, Dr. Barclay stated that Petitioner's psychosis was episodic and that it manifested itself after seizures, which Dr. Barclay characterized as grand mal seizures. Dr. Barclay testified that Petitioner's motor coordination would be poor during the "postictal" stage following a seizure, the same stage during which Petitioner would be psychotic, explaining that the term postictal was elastic and usually referred to the time period closely following a seizure. Dr. Barclay stated that he could not testify whether on June 4, 2004, Petitioner was in a reality phase or a nonreality phase because he (Dr. Barclay) was not there. Tr. at 1223-34.

Dr. Barclay testified that his interviews and review of Petitioner's records indicated that there had never been "a pattern of violence" in Petitioner's past, that Petitioner's nonreality stages after a seizure were nonviolent in nature, and that violent behavior in the period immediately following a seizure is extremely rare. He stated that he did not find any reports of a violent episode in Petitioner's past during the period when he would say things like that he was God following a seizure. Tr. at 1249-1251, 1257.

Dr. Barclay further testified on cross-examination that one of Petitioner's symptom was amnesia for the period before, during, and after a seizure, and that if Petitioner's mental disease or defect caused him to go into a nonreality state on the

day of the murder, he should not have been able to remember what his did on that day. Dr. Barclay acknowledged that according to Dr. Partiwakar's report, Petitioner did recall the events of that day. Tr. at 1252-53.

On redirect, Dr. Barclay explained that Petitioner's intermittent psychotic episodes were manifestations of the organic brain damage and seizure disorder. Dr. Barclay testified that he believed that Petitioner was in a psychotic state when he left this home on the day of the murder and when he returned. In this state, a person could drive a car and beat someone over the head, but would not have good impulse control, would not be able to distinguish between reality and fantasy, and would not be able to make a specific plan and carry it through. Tr. at 1261-65.

Dr. Parwatikar's Testimony

Dr. Parwatikar testified for the State as a rebuttal expert witness. He had interviewed Petitioner five times between October 1994 and July 1995, and diagnosed Petitioner with "personality disorder due to organic factors or a medical condition, which is head injury and seizure disorder" as well as with polysubstance abuse and epilepsy. Tr. at 1284. Dr. Parwatikar testified that during a seizure, Petitioner would not be conscious of what was happening to him, and would have no control over his bodily functions. As he was coming out of a seizure, he would be

confused and have "paranoid ideation." Because of Petitioner's alcohol and substance abuse, in combination with his organic factor, he had poor judgment, became irritable, acted impulsively, and at times seemed to make statements which did "not seem to be related to . . . the actual realties." Tr. at 1286.

Dr. Parwatikar testified that in reviewing Petitioner's medical records, he saw no evidence of amnesia with respect to events preceding a seizure. He further testified that he saw no episodes in the 1990s or late 1980s when Petitioner's psychosis manifested itself with violent behavior. Dr. Parwatikar reiterated that there was nothing in any of Petitioner's medical or psychological records that he ever physically, purposefully attacked another person. Tr. at 1287-91.

Dr. Parwatikar testified that during a seizure as well as in the postictal stage, an individual would not be able to enunciate words clearly or drive a car (as Petitioner had done after the murder). Dr. Parwatikar also testified that according to Petitioner's medical history, his psychotic stages usually lasted anywhere between two hours and two days. Tr. at 1292-94. Dr. Parwatikar testified that Petitioner initially told him that on June 3, 1994, he and the victim had Petitioner's car fixed, returned to the victim's house and talked, and then Petitioner went home and had a seizure. During the July 12, 1995 interview, Petitioner presented a somewhat different version, stating that after he and the victim returned to the victim's house, they had a few drinks and talked, and Petitioner woke up on the couch after a

seizure and realized the victim was speaking to him. Petitioner then said that the next thing he realized was that he woke up and "found the victim in blood" and had a feeling that the victim was dead. Tr. 1296-1301.

On cross-examination, the only information elicited by defense counsel was that Dr. Parwatikar had been paid by the State for his work in connection with this case; that he had testified in over 200 trials, usually for the defense; and that approximately fifty percent of his income came from the State. Tr. at 1306-08.

Closing Arguments

During closing argument, the prosecutor stated as follows:

> Something happened that made the defendant again extremely angry, angry enough to pick up that fireplace poker from the set that sat there on the mantle and attack Ken Reeves with the fireplace poker brutally, brutally. Imagine the force, ladies and gentlemen of the jury, as it drove pieces of the skull back into his brain . . . as it fractured the very base of the skull with the force and intensity of those blows. . . . Imagine the savage force of those repeated assaults on Ken Reeves, five, six, who knows, several multiple force – multiple strikes on his head with that fireplace poker with that claw at the end of it.

> Imagine Ken Reeves in his wheelchair, paraplegic, unable to defend himself . . . can you imagine the shock, the total terror and the pain when he was first struck with that fireplace poker? If he came at him from the front, ladies and gentlemen, can you imagine the sheer terror of sitting there in that chair with your hands folded across your front and watching this man come at you with this weapon and to strike you and to beat you like that and the pain it must've caused.
>
> * * *
>
> He was either taken from behind or he watched his killer walk up to him and strike him with that fireplace poker. This was, and I'll say it again, and I'll probably say it more, a brutal, brutal attack. This is not the way anybody wants to go.
>
> * * *
>
> As he's hitting Ken Reeves with his fireplace poker, crashing sound of the bone breaking, the blood splattering, he has got to think to bring his arm back and hit him again, bring his arm back and hit him again, bring his arm back and hit him again. You know what happened.

Tr. 1335-38, 1367. Defense counsel did not object to any of these comments.

In his closing argument, defense counsel first argued that the evidence did not establish beyond a reasonable doubt that Petitioner was the perpetrator.

Counsel then focused on the mental health defenses. Tr. 1342-61.

Jury Instructions

The jury was instructed that they could not find Petitioner guilty of first-degree murder if they believed he was not guilty by reason of a mental disease or defect excluding responsibility. The jury was further told that if they did not find Petitioner guilty of first-degree murder, they had to consider whether he was guilty of second-degree murder, again instructing the jury that they could not find him guilty of second-degree murder if they believed he was not guilty by reason of a mental disease or defect. Resp. Ex. at 43, 47. Under Missouri law, finding a defendant guilty of first-degree murder requires a finding that he "knowingly cause[d] the death of another person after deliberation upon the matter." Mo. Rev. Stat. § 565.020. "Deliberation" is defined as "cool reflection for any length of time no matter how brief." *Id.* (3). Second-degree murder does not require "deliberation." *Id.* § 565.021.

In addition, the jury was told that if they did not believe that Petitioner lacked responsibility by reason of a mental disease or defect, they could still consider whether he had a mental disease or defect in determining whether he was able to deliberate, as required for a finding of guilty of first-degree murder. Resp. Ex. B at 53. On June 8, 1996, the jury returned

verdicts of guilty of first degree murder and armed criminal action.

Motion for New Trial and Direct Appeal

Petitioner was granted an extension of time until July 5, 1996, to file a motion for a new trial. Resp. Ex. A at 97.[4] The motion was filed July 8, 1996.[5] On direct appeal, Petitioner argued that the trial court erred in the following four ways, each of which violated Petitioner's federal constitutional right to a fair trial: (1) excluding the testimony of the defense's additional mental health experts as a sanction for their late endorsement; (2) admitting the taped conversations between Petitioner and the victim's wife; (3) denying

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[4] Missouri Rule of Criminal Procedure 29.11(d) requires that a motion for a new trial be filed within fifteen days of the jury's verdict.

[5] In this motion, Petitioner claimed the trial court had committed error by: denying Petitioner's motion for acquittal due to insufficient evidence; failing to strike the venire panel after a member stated that he did not believe in mental capacity defenses; failing to grant a mistrial after the prosecutor stated during void dire that the defense planned to argue that although Petitioner committed the murder, he should be found not guilty by reason of mental disease or defect; excluding Petitioner's statement to Dr. Barclay that Petitioner had killed Angie Hausman; admitting photographs of the victim and the crime scene; admitting the taped conversations between Petitioner and the victim's wife; excluding Petitioner's late-named witnesses; and limiting Petitioner to only one witness to testify about Petitioner's behavior at jail after his arrest. Resp. Ex. A at 105-120.

Petitioner's motion for a mistrial following the prosecutor's statement during voir dire that the defense planned to rely on the defense that although Petitioner committed the murder, he should be found not guilty by reason of mental disease or defect; and (4) failing to *sua sponte* declare a mistrial following the above-quoted comments by the prosecutor during closing argument personalizing the crime. Resp. Ex. D.

The State responded to all four points on the merits and did not argue that Petitioner was precluded from raising them by filing an untimely motion for new trial. In affirming Petitioner's convictions, the Missouri Court of Appeals summarily stated that it had reviewed the briefs of the parties, the legal file, and the record on appeal, and found the claims of error to be without merit. Resp. Ex. F.

State Post-conviction Proceedings

In his amended motion for state post-conviction relief, prepared with the assistance of counsel, Petitioner raised several claims of ineffective assistance of trial counsel, including the three claims presented in the present habeas petition: that counsel was ineffective in failing to (1) competently present defenses of diminished capacity and not guilty by reason of mental disease or defect; (2) object to the prosecutor's above-quoted closing argument as inflammatory; (3) file a timely motion for a new trial and thereby preserve trial errors for appeal.

With regard to the first claim, Petitioner pointed to trial counsel's failure to introduce Petitioner's medical records; rehabilitate Dr. Barclay with respect to his testimony on cross-examination that, among other things, Petitioner did not have a history of violence associated with his psychotic episodes, and that Petitioner's psychotic episodes were confined to the postictal stage of a seizure; cross-examine Dr. Partiwaker with respect to his testimony that, among other things, Petitioner did not have a history of violence during his psychotic episodes, and that his psychotic episodes lasted from two hours to two days. Resp. Ex. I at 41-125.[6]

Evidentiary Hearing

Defense counsel and Dr. William Logan, a psychiatrist specializing in forensic psychiatry, testified at the evidentiary hearing on Petitioner's post-conviction motion.[7] Dr. Logan stated that he had been

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[6] Petitioner also asserted that (1) trial counsel was ineffective in presenting inconsistent defenses of actual innocence and insanity/diminished capacity, (2) appellate counsel was ineffective in failing to appeal the trial court's ruling preventing Dr. Barclay from explicitly discussing Petitioner's capacity to deliberate, and (3) trial counsel was ineffective in failing to object to the State's improper elicitation of victim impact evidence at trial. Resp. Ex. V at 2-3, 7-8. These claims were rejected by the state courts and are not raised here.

[7] Petitioner also presented the testimony of his direct appeal counsel, who testified that the failure was a matter of negligence on her part. This issue is not presently before the Court.

asked by Petitioner's post-conviction counsel to evaluate Petitioner's mental state on the day of the murder. Dr. Logan stated that he conducted a three and one-half hour interview with Petitioner, upon which he relied primarily in forming an opinion about Petitioner's history. To form an opinion on Petitioner's mental state on the day of the murder, Dr. Logan relied upon hospital records, the testimony at trial, and the reports of the mental health experts who testified. Dr. Logan diagnosed Petitioner with a seizure disorder, which developed into an organic personality disorder with periodic organic psychosis during times when Petitioner was having uncontrolled seizures. Dr. Logan opined that Petitioner did not have the ability to deliberate on June 3, 1994, and stated that his diagnosis was within the definition of mental disease or defect in Mo. Rev. Stat. § 552.030. PC Tr. at 29-30.

Dr. Logan explained that after a number of years of having seizures, individuals like Petitioner develop features of organic personality disorder, which include paranoia and an inability to satisfactorily interact with others. He went on to explain that when Petitioner would have a number of uncontrolled seizures, he would develop "frank psychotic symptoms," which would include believing he was God, and "paranoid, persecutory" ideas. During these times, Petitioner would require hospitalization. PC Tr. at 31-32.

Dr. Logan reviewed Petitioner's medical history, which indicated a family history of seizures; and the

early presence of brain damage, exacerbated by head trauma from the car accident in 1981, after which Petitioner's seizures began. Dr. Logan noted that it is more usual to see organic personality disorders in individuals who have had epilepsy for some time, and especially if the epilepsy were poorly controlled, factors which were both present in Petitioner's case. PC Tr. at 32-39.

Dr. Logan testified that Petitioner experienced partial and generalized seizures (which used to be called grand mal seizures), for which drug therapy was the only treatment. Dr. Logan noted that the medical records indicated that Petitioner was not compliant with his Dilantin regimen. He explained that Petitioner's organic psychosis was not an ongoing condition, but would go away with medication for both the psychosis and the seizures; whereas his organic personality disorder would not be influenced by medication, but would be less prominent over time if Petitioner consistently took medication. PC Tr. at 40-48.

Dr. Logan testified that Petitioner's medical records indicated that when Petitioner was psychotic, he would become hyper-religious and obsessive about the molestation he experienced in his youth. Dr. Logan stated that this was evidenced by Petitioner's comments about the victim following the murder. Dr. Logan repeated that when Petitioner was having a psychotic episode, he had to be hospitalized and given medication. The symptoms would then resolve within a few days, but not immediately. PC Tr. 53-56.

Dr. Logan opined that on the day of the murder, Petitioner was suffering from psychosis resulting from uncontrolled seizures. Dr. Logan stated that Petitioner's statement accusing his mother of poisoning him indicated a psychotic episode. Dr. Logan testified that on June 3, 1994, Petitioner would not have been able to appreciate the nature, consequences, or wrongfulness of his conduct. When Petitioner became paranoid, his beliefs about a person became distorted, and he could not determine how to behave. Tr. at 57-65.

Dr. Logan stated that the testimony at trial indicating that Petitioner had no prior history of violence associated with psychosis was the opposite of his conclusion based upon a review of the medical records. Dr. Logan then cited the medical records that showed violent episodes associated with psychosis, including the records dated March 12, 1994, November 16, 1993, and April 14, 1992, described above. He stated that the testimony that Petitioner was not violent when psychotic was unsupported by the record, and also unsupported by Dr. Logan's experience, as individuals experiencing psychotic episodes, particularly if they also experience paranoia, commit violent acts. PC Tr. at 68-73.

Dr. Logan testified that Petitioner's psychotic episodes would last until he was given treatment, contrary to Dr. Barclay's testimony during cross-examination, suggesting that Petitioner's mental disorder would be confined to the postictal stage of a seizure. Dr. Logan also testified that Dr. Parwatikar's

statement that Petitioner's psychotic episodes could last from two hours to two days was not only inconsistent with Petitioner's medical history, but was also medically untrue. Dr. Logan stated that there was no place in the record that indicated that Petitioner's psychotic episodes would resolve without treatment. PC Tr. 74-79.

Dr. Logan disagreed with Dr. Parwatikar's contention that there was no evidence of retrograde amnesia associated with Petitioner's seizures, and with his contention that Petitioner's ability to enunciate clearly following the murder indicated that he was not in a psychotic state. Tr. at 91-95.

The State presented defense counsel as its witness. He testified that he did not introduce evidence of Petitioner's past acts of violence because he did not believe the evidence was necessary for an expert to form an opinion as to whether Petitioner could have had intent or controlled his actions. Defense counsel explained that because many people perform violent acts in the absence of psychosis, he believed introducing Petitioner's past incidents of violence would only tarnish Petitioner's image with the jury. PC Tr. at 166-68.

When asked why he did not seek to have Petitioner's medical records introduced as evidence, trial counsel responded, "those that were necessary to arrive at the medical opinion were introduced. Beyond that, I saw no need for it." PC Tr. at 169. Defense counsel stated that he believed that there was

ample evidence introduced at trial that supported Dr. Barclay's opinion, and that that was what counted. Further, defense counsel did not present the medical records because he had concerns about the length of the trial and felt the jury would be prejudiced toward Petitioner if cumulative and repetitive information were presented. Defense counsel explained he did not feel the medical records were particularly persuasive to a lay juror, and that the average juror looks at medical records as "paper work" and is more interested in "the bottom line." PC Tr. at 170-171.

Defense counsel testified that he decided not to "extensively" cross-examine Dr. Parwatikar because Dr. Parwatiker "projects a very professional image. He's a tall, good-looking man. He has a very professional demeanor. He's commanding in his appearance." Defense counsel felt that to attack such a skilled expert would have been "fruitless" and would have likely "backfired." Defense counsel stated that he did not think it was appropriate strategy to try to rehabilitate his own witness because it would drag out the length of the trial, bore the jury and get them off track ("You don't want to try a case over minutia"), and if the witness had made a mistake, rehabilitation could make things worse. PC Tr. at 171-73.

In response to questioning about his failure to object to the State's closing argument, Defense counsel explained that "closing argument is sacred ground upon which you should not trod." Furthermore, defense counsel stated that it would be a mistake to believe that by objecting to closing argument it is

possible to change a juror's mind in a positive way. Defense counsel also expressed concern that the jury would have been alienated by an objection at that point because they wanted to get through with the trial. PC Tr. at 178-79.

Defense counsel stated that he contacted Petitioner's parents after the trial and told them to call the Public Defender's office immediately regarding the filing of a motion for a new trial. However, after speaking with the Public Defender's office, defense counsel determined that they could not meet the deadline, and he decided to file the motion himself. He testified that he tried to file it on (Friday) July 5, 1996, but the courthouse was closed; he returned the next morning, but the courthouse was still closed. PC Tr. at 183-87.

Decisions of the Motion Court and Missouri Court of Appeals

The motion court rejected all of Petitioner's claims.[8] With regard to the claim that trial counsel

[8] Petitioner notes that the motion court adopted, verbatim, the State's proposed findings of fact and conclusions of law. As recognized by the Eighth Circuit, "[i]mportant evidence is more likely to be overlooked or inadequately considered" when a court adopts verbatim a party's proposed findings of fact and conclusions of law, than when "factual findings are the product of personal analysis and interpretation by the trial judge." *Jones v. Int'l Paper* Co., 720 F.2d 496, 499 (8th Cir. 1983). Nevertheless, such findings and conclusions are formally the court's. Id.; *see also Jolly v. Gammon,* 28 F.3d 51, 54 (8th Cir. 1994) (verbatim

(Continued on following page)

failed to effectively present a mental disease defense, the court noted that counsel presented the testimony of Dr. Barclay, a qualified expert. The court stated that counsel could not "be faulted for failing to shop for a psychiatrist who would testify more favorably," and that, because Dr. Logan's testimony did not "provide a new or unique defense," failure to present his testimony could not establish ineffective assistance of counsel. The court concluded that "decisions as to which expert to call and what issues to explore on direct examination are unreviewable trial strategy." Resp. Ex. I at 134.

The court held that counsel's failure to introduce Petitioner's medical records did not present a ground for relief, noting counsel's testimony at the post-conviction hearing that the records were cumulative evidence, and that their introduction would have lengthened the trial to Petitioner's detriment. *Id.* at 135.

The court held that trial counsel's failure to substantively cross-examine Dr. Parwatikar and rehabilitate Dr. Barclay was reasonable trial strategy. The court found that none of the asserted omissions "would have presented a viable defense," that Petitioner did not establish what the expert witnesses would have stated had other questions been posed,

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adoption by state post-conviction court of the state's proposed findings of fact and conclusions of law is not a ground for federal habeas relief).

and that trial counsel had valid reasons to avoid prolonging the testimony of the experts. Further, the court held that the omission of certain facts of which Petitioner asserted the jury should have been aware – Petitioner's "tendency to be a confabulator, alcoholic, pedophile, and a propensity for violence" – was reasonable trial strategy. *Id.*

The court found that, while a portion of the prosecutor's closing argument improperly personalized the crime, this transgression was "brief and isolated" and was not of such a graphic nature as to render failure to object to it ineffective assistance of counsel. The court noted that there is no allegation that the State compounded the error by arguments that contained facts outside the record or misstated the evidence. The court also pointed to trial counsel's testimony that he chose not to object during closing argument for fear of alienating the jury. The court further noted that the appellate court had addressed the issue of personalization on direct appeal, and found that the prosecutor's statements did not warrant awarding a new trial. The court held that Petitioner failed to prove that the prosecutor's remarks were prejudicial, considering the substantial evidence implicating Petitioner that the State presented, and that trial counsel's failure to object did not amount to ineffective assistance of counsel. *Id.* at 139-41.

The court rejected Petitioner's claim that trial counsel was ineffective for failing to preserve issues for appeal by filing a timely motion for a new trial, because there was no evidence that this in any way

prejudiced Petitioner. The court noted that the state did not argue on direct appeal that any of Petitioner's points were not preserved, and the appellate court ruled on direct appeal that no errors of law appeared. The motion court concurred hat no prejudice resulted from any failure to preserve issues, finding that neither the exclusion of Petitioner's witnesses as cumulative, the admittance of the audiotape, nor the refusal to grant a mistrial during voir dire were reversible error. Accordingly, the court stated that it did not have to reach the issue of whether the motion was in fact timely filed. *Id.* at 141-43.

The Missouri Court of Appeals affirmed the motion court on all points. The appellate court held that trial counsel's presentation of the insanity defense at trial through Dr. Barclay, including counsel's failure to admit Petitioner's medical records and have Dr. Barclay discuss them, did not amount to ineffective assistance of counsel. The court found hat the record did not support the claim that Dr. Barclay's trial testimony did not include some of the facts Petitioner claimed counsel should have asked Dr. Barclay about, "for example, [Petitioner's] failure to take his medicine, frequent seizures, multiple seizures the day of the attack, hospitalization shortly after the attack, claiming his mother had poisoned him, etc." The court concluded that other facts, "such as [Petitioner's] alcohol consumption, his sexual molestation as a child, his alleged belief that the victim was evil," were reasonably omitted as potentially prejudicial to Petitioner.

The court "[found] it noteworthy" that Petitioner called a different psychiatric expert at the post-conviction evidentiary hearing, and concluded that some of the matters at issue, such as whether it was the seizures themselves that would trigger a temporary state of psychosis in Petitioner, reflected differences of expert opinion, rather than facts that trial counsel failed to elicit at trial. Finally, the court found that any alleged deficient performance was not shown to have prejudiced Petitioner, because he failed to demonstrate a reasonable probability that a competent handling of Petitioner's expert witness would have resulted in a different verdict. Rep. Ex. V at 3-5.

The appellate court also held that trial counsel was not ineffective for failing to adequately rehabilitate Dr. Barclay or to substantively cross-examine Dr. Parwatikar. The court stated that this claim was an extension of the argument that counsel had not competently handled Dr. Barclay, and so denied that portion of the claim on the same grounds as above. The court also found that many of the items of Dr. Parwatikar's testimony that Petitioner claimed should have been challenged, such as statements that "violence is not normally possible during a seizure, or that it is nearly impossible for a psychotic person to drive, or that [Petitioner] appeared to be rational and not psychotic when making certain statements to witnesses near the time of the murder, based on the manner in which he made those statements, or that [Petitioner's] psychotic episodes were 'triggered' by seizures," were matters of expert opinion rather than

refutable facts. Further, the court found that any attempt to discredit Dr. Parwatikar, given his "commanding presence and impressive credentials," might have backfired by making his testimony seem more convincing. Therefore, the appellate court held that the motion court did not clearly err in finding that defense counsel's "somewhat unusual" failure to cross-examine the witness represented reasonable trial strategy. *Id.* at 5-7.

The appellate court next turned to Petitioner's claim that trial counsel was ineffective for failing to object to the prosecutor's improper personalization during closing arguments. The appellate court held that the motion court did not err in finding the claim unreviewable, as the issue had been previously raised on direct appeal and the appellate court had found no plain error. *Id.* at 9. The appellate court further held that the motion court did not err in finding that trial counsel was not ineffective for failing to file a timely motion for a new trial, because any such error did not prejudice Petitioner. Specifically, the court found that there was no merit to the claim that the audiotapes of conversations between Petitioner and the victim's wife should have been excluded as too remote in time and unfairly prejudicial, and therefore failure to preserve that issue did not prejudice Petitioner. *Id.* at 10. The post-conviction claims not raised in the present habeas petition were also rejected by the state appellate court.

DISCUSSION

Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a claim has been adjudicated on the merits in state court, an application for a writ of habeas corpus cannot be granted unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). "AEDPA effected a move toward greater deference in the § 2254 courts' review of state-court decisions." *Brown v. Luebbers,* 371 F.3d 458, 460 (8th Cir. 2004) (en banc), *cert. denied,* 125 S. Ct. 1397 (2005).

The "contrary to" clause is satisfied if a state court has arrived "'at a conclusion opposite to that reached by [the Supreme Court] on a question of law'" or "'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent'" but arrives at the opposite result. *Lockyer v. Andrade,* 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor,* 529 U.S. 362, 405 (2000)). A state court "unreasonably applies" clearly established federal law when it

"identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of petitioner's case. . . . That is, the state court's decision must have been not only incorrect or erroneous, but objectively unreasonable." *Rompilla v. Beard,* 125 S. Ct. 2456, 2462 (2005) (citations omitted); *see also Calvin v. Taylor,* 324 F.3d 583, 587 (8th Cir. 2003) (under AEDPA, a writ of habeas corpus may not be granted "unless the relevant state court decision is *both* wrong *and* unreasonable"). "The factual findings of the state court also may be challenged in a § 2254 petition, but they are subject to an even more deferential review." *Kinder v. Bowersox,* 272 F.3d 532, 538 (8th Cir. 2001). Factual findings by the state court "shall be presumed to be correct, a presumption that will be rebutted only by "clear and convincing evidence." 28 U.S. C. § 2254(e)(1).

Ineffective Assistance of Counsel

Petitioner's first claim is that trial counsel was constitutionally ineffective in failing to competently present defenses of diminished capacity and not guilty by reason of mental disease or defect. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of trial counsel. *Strickland v. Washington,* 466 U.S. 668, 686 (1984). To succeed on a claim of ineffective assistance of trial counsel, a habeas petitioner must establish both "that counsel's representation fell below an objective standard of reasonableness," and that but for counsel's

deficiency there is "a reasonable probability" that the result of the trial would have been different." *Id.* at 688.

When addressing the adequacy of counsel's performance, a federal district court must be "highly deferential," and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Odem v. Hopkins,* 382 F.3d 846, 850 (8th Cir. 2004) (quoting *Strickland,* 466 U.S. at 689). There is a strong presumption that counsel's performance fell "within the wide range of professional assistance." *Id.* "Lawyer are not perfect, and the Constitution does not guarantee a perfect trial." *Jones v. Delo,* 258 F.3d 893, 902 (8th Cir. 2001); *see also Whitfield v. Bowersox,* 324 F.3d 1009, 1018 (8th Cir. 2003) (although not perfect, counsel's performance was not constitutionally deficient). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa,* 100 F.3d 586, 590 (8th Cir. 1996). However, "counsel must exercise reasonable diligence to produce exculpatory evidence, and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout,* 937 F.2d 1298, 1304 (8th Cir. 1991).

Error by counsel, even if professionally unreasonable, does not necessarily require that a judgment be set aside. "[A] defendant must affirmatively show prejudice. It is not sufficient for a defendant to show

that the error had some 'conceivable effect' on the result of the proceeding. . . . The defendant must show that because of counsel's error, there is a reasonable probability that the result of the proceeding would have been different. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Strickland,* 466 U.S. at 686; *see also King v. Kemna,* 266 F.3d 816, 823 (8th Cir. 2001); *Jones,* 258 F.3d at 901.

Moreover, in the context of a § 2254 petition, a petitioner "'must do more than show that he would have satisfied *Strickland's* test if his claims were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Underdahl v. Carlson,* 381 F.3d 740, 742 (8th Cir. 2004) (quoting *Bell v. Cone,* 535 U.S. 685, 698-99 (2002)).

Accordingly, in the present case, Petitioner must show that it was objectively unreasonable for the state courts to conclude that (1) trial counsel performed competently, and (2) there was no reasonable probability that competent performance by defense counsel would have resulted in a verdict of not guilty of first-degree murder. *See Jones,* 258 F.3d at 901.

Insanity/Diminished Capacity Defenses

Under Missouri law, a defendant is not responsible for his conduct if, as a result of a "mental disease or defect," such person was "incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct." Mo. Rev. Stat. § 552.030.1. The statute defines "mental disease or defect" as follows:

> The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy. . . .

Mo. Rev. Stat. § 552.030.1.

A "diminished capacity" defense permits a defendant to introduce evidence of a mental disease or defect to prove the absence of a particular mental element of the crime, such as "deliberation," which is an element of first-degree murder. Unlike the defense of "not guilty by reason of insanity," the defendant accepts criminal responsibility for his conduct, but is convicted of a lesser crime because the mental defect prevented the defendant from forming the mental element of the higher degree crime. *Wilkins v. Bowersox,* 933 F. Supp.

1496, 1517 n.18 (W.D. Mo. 1996) (citing *State v. Anderson,* 515 S.W.2d 534, 537 (Mo. 1974)).

A "defense of diminished capacity because the accused is incapable of forming the mental element necessary to commit a crime is necessarily based on evidence of a mental disease or defect as defined in § 552.010." *State v. Erwin,* 848 S.W.2d 476, 480 (Mo. 1993) (en banc); *Khaalid v. Bowersox,* 259 F.3d 975, 978 (8th Cir. 2001). Under the defense of diminished capacity, a finding of mental disease or defect would *permit* the jury to conclude that appellant was unable to form the necessary specific or general intent and to thereby acquit him of the offense charged; "[t]he jury must still determine, considering all the evidence, whether that mental disease or defect prevented the defendant from forming the requisite mental state at the time of the offense." *Wainwright v. State,* 143 S.W.3d 681, 685 n.1 (Mo. Ct. App. 2004) (quoting *Nicklasson v. State,* 105 S.W.3d 482, 484-85 (Mo. 2003) (en banc)).

Here, the Court finds unreasonable the state courts' determination that trial counsel's presentation of Petitioner's insanity and diminished capacity defenses was not deficient. The failure to name the excluded mental health witnesses on time was clearly not a matter of trial strategy. There was little justification for this failure, as this attorney represented Petitioner for more than one and one-half years prior to trial, and at least some of the names were apparently provided to him by the public defender. Nevertheless, in excluding these witnesses, the trial court

instructed defense counsel that even though the witnesses who prepared the reports would be excluded as untimely named, counsel could introduce the contents of Petitioner's mental health records in conjunction with the testimony of the experts who *would* be testifying. Defense counsel, however, failed to do this. The reasons offered by counsel at the post-conviction hearing were that he believed the records were cumulative, that they would bore the jury, and that prolonging the trial by introducing the records would turn the jury against Petitioner.

The state motion court summarily concluded that these reasons did not provide grounds to grant post-conviction relief to Petitioner. The state appellate court dealt with this issue by noting that some of the facts in the medical records that Petitioner claimed should have been elicited from Dr. Barclay (e.g., Plaintiff's failure to take his medicine, his multiple seizures and hospitalization on the day of the murder), were, in fact, included in Dr. Barclay's testimony. The court also noted that other facts in the records (e.g., Plaintiff's alcohol consumption) could have prejudiced the jury against Petitioner. The undersigned finds little support for some of the appellate court's factual findings. For example, although the appellate court suggests that Dr. Barclay, in fact, testified that Petitioner had not taken his medication, this Court finds no such testimony by Dr. Barclay. Nor did Dr. Barclay testify to multiple seizures on the day of the attack.

More importantly, neither court addressed the highly probative evidence in the omitted medical records, namely, the multiple incidents of Plaintiff's violent behavior connected to his mental problems, the "florid psychosis" and non-orientation "to person/place/time" observed by the admitting physician at the hospital several hours after the murder, and the fact that his medication was found to be significantly below therapeutic level at the time.

The Court believes that a finding that defense counsel's failure to admit the contents of Plaintiff's medical records was a reasonable trial strategy is objectively unreasonable. At the post-conviction hearing, trial counsel himself seemed to think that he introduced at least some of the records but, in fact, he did not. The reasons offered by defense counsel and accepted by the motion court for not introducing the relevant medical records – namely, that they were cumulative, would bore the jury, and would prolong the trial – are objectively unacceptable as reasonable trial strategy in this case. The import of these records cannot be overstated, especially where both the experts and Petitioner himself disclaimed any history of violence during these episodes – a fact the medical records contradicts. Moreover, dismissing the information as cumulative cannot be justified where much of Petitioner's medical history came in only through the testimony of family and friends, more easily dismissed as biased than the years of documented medical history. Nor can a desire not to prolong the trial justify the complete failure to introduce any

records whatsoever to support petitioner's main defense, especially where, as here, such records demonstrate a persistent pattern of bizarre and violent behavior by Petitioner when not properly medicated.

Furthermore, defense counsel's virtual failure to cross-examine the State's mental health expert is hard to justify as reasonable trial strategy. At the state post-conviction hearing, counsel stated that he did not cross-examine Dr. Partiwarkar because he believed that cross-examining such an impressive witness would have alienated the jury. The state appellate court acknowledged that this strategy "may be somewhat unusual," but nevertheless concluded that counsel's decision fell within the range of reasonable trial strategy.

This Court finds this conclusion unreasonable. A desire not to alienate the jury is certainly a goal of every defense attorney. However, this goal could be accommodated by a reasonably skillful, nonaggressive cross-examination. The failure to do so is especially egregious when the witness's testimony left much room for effective impeachment. Dr. Partiwakar's testimony that Plaintiff's medical records showed no history of violent conduct associated with a mental disorder is refuted by the records themselves. As stated above, Petitioner's medical records indicate several occasions on which Petitioner's psychotic episodes were accompanied by assaultive behavior. One record even noted homicidal behavior.

Having concluded that defense counsel's performance with regard to presenting a mental health defense was constitutionally deficient, the Court must evaluate the state courts' decisions with regard to whether Petitioner established prejudice resulting from trial counsel's deficient performance. The appellate court found that Petitioner failed to meet his burden of demonstrating prejudice because there was sufficient evidence of Defendant's sanity at the time of the offense. But this finding ignores the fact that the evidence came solely from the state's expert, whose testimony would have been significantly undercut through proper use of the medical records.

Furthermore, this is not a case in which the evidence of guilt of first-degree murder was strong. To be sure, the evidence that Petitioner was the perpetrator was overwhelming; the evidence of planning or deliberation, however, was not. Aside from the prosecutor's speculation that Petitioner had been blackmailing the victim, and that the victim may have refused to pay him more money, the only evidence of planning or deliberation is the taped conversations between Petitioner and the victim's wife from several years before the murder. In light of the intervening years of interaction and friendship between Petitioner and the victim, this can hardly be characterized as strong evidence of deliberation some seven years later. *Cf. Jones,* 258 F.3d at 903 (even though counsel may have been ineffective in failing to present diminished capacity defense in first-degree murder case, prejudice prong of ineffective assistance

claim was not met where there was strong evidence of planning and deliberation). Against this scant record of deliberation, defense counsel's deficient performance leaves the undersigned with little confidence in the outcome of the proceeding, and any contrary finding appears objectively unreasonable.

In sum, this Court believes that the state courts' adjudication of Petitioner's claim that trial counsel rendered ineffective assistance in failing to competently present a diminished capacity defense involved an objectively unreasonable application of *Strickland.* The conclusion reached by the state courts – that there is no reasonable probability that Petitioner would not have been found guilty of first-degree murder had the jury been aware of Petitioner's mental health history as reflected in the medical records in this case – is a conclusion this Court finds to be factually and legally unreasonable.

Failure to Object to the Prosecutor's Closing Argument

The Supreme Court has ruled that in order to be a constitutional violation, a statement by a prosecutor must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974)). The Supreme Court listed several factors to consider in determining whether a misstatement by a prosecutor was so egregious that it required a new

trial as a matter of constitutional law: (1) whether the prosecutor's statement manipulated or misstated the evidence; (2) whether the remarks implicated specific rights of the accused such as the right to counsel or the right to remain silent; (3) whether the defense invited the comment; (4) instructions given by the trial court; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut the statement. *Id.* at 181-82.

As noted above, the state appellate court summarily rejected this and all other arguments raised on direct appeal. For purposes of habeas review, that summary decision is presumed to have been on the merits. *See Carter v. Bowersox,* 265 F.3d 705, 712 (8th Cir. 2001). Upon review of the record, this Court concludes that Petitioner cannot establish that the outcome of the trial probably would have been different but for counsel's failure to object to the prosecutor's closing argument. *See Roberts v. Bowersox,* 61 F. Supp. 2d 896, 913-914 (E.D. Mo. 1999) ("personalization of the victim's suffering could not have added appreciably to the impact of the horrific facts of the crime. Therefore, petitioner has failed to demonstrate ineffective assistance of counsel"). The state court's rejection of this claim was not factually or legally unreasonable.

Failure to File a Timely Motion for New Trial

The Court also does not believe that the state courts' adjudication of this claim was unreasonable.

As the Missouri Court of Appeals stated, there is no evidence of any prejudice to Petitioner resulting from the date of the filing of the motion for new trial.

CONCLUSION

Petitioner received ineffective assistance of trial counsel due to a combination of counsel's failure to introduce medical records establishing Petitioner's psychotic state on the day of the murder and violent behavior associated with Petitioner's psychotic episodes, and failure to effectively cross-examine the State's mental health expert. The state courts' conclusion to the contrary is objectively unreasonable.

Accordingly,

IT IS HEREBY ORDERED that Richard Marcrum's petition for a writ of habeas corpus is **GRANTED.**

IT IS FURTHER ORDERED that the State of Missouri shall have the option of re-trying Petitioner within 90 days of the date of this Memorandum and Order, or releasing him.

A separate document granting the writ shall accompany this Memorandum and Order.

The Court expresses its gratitude to Petitioner's appointed attorney for his dedicated representation of his client and assistance to the Court.

/s/ Audrey G. Fleissig
AUDREY G. FLEISSIG
UNITED STATES
MAGISTRATE JUDGE

Dated this 30th day of September, 2005.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-3930

Richard Louis Marcrum,

Appellee

v.

Al Luebbers,

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:02-cv-1167-AGF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Benton did not participate in the consideration or decision of this matter.

February 14, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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(3)

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 07-1566

RICHARD MARCUM,
Petitioner,
v.
DON ROPER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

Petitioner filed his petition for writ of habeas corpus on June 7, 2002. After pleading by respondent and petitioner, United States Magistrate Audrey G. Fleissig issued an order finding the habeas petition was timely (App. 54). After additional briefing by respondent and petitioner, Magistrate Fleissig issued a Memorandum and Order granting the petition (App. 53). The district court issued a writ of habeas corpus based on that order (App. 53). The district court based its decision upon its conclusion that petitioner received ineffective assistance of trial counsel because counsel did not competently present a diminished capacity defense (App. 97).

The state appealed. The court of appeals concluded that trial counsel acted reasonably in obtaining one psychiatric expert and not more (App. 49-51). The court of appeals also concluded that petitioner did not demonstrate Strickland prejudice in the presentation of the diminished capacity defense (App. 41-48). Without dissent, the court of appeals declined rehearing en banc (App. 101).

Statement of Facts

The state charged Richard L. Marcrum by information in the Jefferson County Circuit Court, Missouri on September 13, 1994, with first degree murder, §565.020.1, RSMo. 1994 and armed criminal action, §571.015.1, RSMo. 1994. The sufficiency of the evidence is not in dispute. Viewed in the light

most favorable to the verdicts, the evidence presented at jury trial showed the following:

In June 1994 the murder victim, Reverend Kenneth Reeves, lived in Imperial, Missouri, which is in Jefferson County, along with his wife, Katie (Tr. 541-43). Reverend Reeves was pastor of Rock Presbyterian Church in Imperial; Mrs. Reeves was a schoolteacher (Tr. 542). Mrs. Reeves first met Petitioner in 1987, when he came to their home and agreed to refinish some furniture (Tr. 546-47, 577-79). Petitioner, however, did not finish the job, and he wanted more money even though he had already been paid the agreed-upon price (Tr. 547). In June 1992 Reverend Reeves fell from a tree in his yard and was paralyzed from the waist down. He was, thereafter, confined to a wheelchair (Tr. 544, 549, 588). While Reverend Reeves was in the hospital, Petitioner came to visit him. Mrs. Reeves told Petitioner that he was not welcome, and Petitioner told her she was "a bitch" and left (Tr. 549-50).

On June 2, 1994, Reverend Reeves bought a 1981 Buick, apparently on behalf of Petitioner, from Earl's Auto Sales in Imperial. He wrote a $500 check for the down payment (Tr. 556-57, 765, 767-68). Reverend Reeves cosigned a loan with Petitioner to pay for the car (Tr. 557, 768-72). This car was repossessed several weeks later because the payments had not been made (Tr. 765-66).

At about noon on June 3, 1994, Jeffrey Chism left his home, which was next to the Reeves's house, to buy some cigarettes (Tr. 194-96). As he pulled out of his driveway, Chism noticed a car parked along the road outside the Reeves' residence (Tr. 196-97). Chism thought it was unusual for a car to be parked

on that road (Tr. 196). The car was still there when Chism returned home about ten minutes later; but when Chism left for work at about 2:40 p.m. the car was gone and the police had arrived (Tr. 198-99).

Sometime between 2:20 and 2:30 p.m., Gary Paszkiewicz, who also lived next to the Reeves' house, returned home from work (Tr. 205-06). As he parked his truck in front of his house, Paszkiewicz noticed a bluish-gray car with what appeared to be a police-style spotlight parked in front of the Reeves' house next door (Tr. 206-07, 223). About 10-15 minutes later, Paszkiewicz, along with his wife and daughter, left home to pick up the couple's other children in Kimmswick (Tr. 208, 222). As the Paszkiewicz family prepared to get into their truck, they noticed a man, whom Paszkiewicz and his wife identified as Petitioner, standing by the car that Paszkiewicz had seen earlier (Tr. 209-11, 223-24). Paszkiewicz drove up, rolled down the window, and asked Petitioner if he could help him (Tr. 211, 223-24). Petitioner said, "Praise the Lord, I just killed one sorry son-of-a-bitch and I will get another." (Tr. 211, 224). Paszkiewicz asked Petitioner to repeat what he had said, and Petitioner said the same thing (Tr. 212).

Paszkiewicz then began driving towards Kimmswick, but he and his wife decided to go back because of Petitioner's statement. They dropped their daughter off at a friend's house and returned to the Reeves' home (Tr. 213-14, 225-26). When they returned, neither the car they had seen earlier nor Petitioner was there (Tr. 214, 226). Paszkiewicz and his wife got out of their truck and upon approaching the house they noticed that the front door was ajar (Tr. 214-15). They also heard "hard breathing"

coming from inside the house, as if someone was having trouble breathing (Tr. 215, 226-27). The couple entered the house and Paszkiewicz saw part of a fireplace poker, with blood on it, lying near the front door (Tr. 215-16, 227). They then saw Reverend Reeves lying on the floor in the middle of the room, where "there was blood everywhere," particularly around his head. Reverend Reeves's wheelchair had also been tipped over (Tr. 217-18, 227-28). Paszkiewicz's wife, who was a medic in the military, helped Reverend Reeves while Paszkiewicz called 911 (Tr. 219, 231). Paszkiewicz's wife found a towel and placed it under Reverend Reeves's head in an attempt to control the bleeding (Tr. 228-29). While doing so she noticed that Reverend Reeves had "multiple holes in his head." (Tr. 227). Reverend Reeves was unresponsive (Tr. 230).

When the paramedics arrived, they saw Reverend Reeves lying on the floor with blood puddled around his head (Tr. 177-79). His wheelchair was lying on its side near Reeves' feet (Tr. 179-80, 186). The paramedics also found the handle of a fireplace poker lying in the middle of the floor next to Reverend Reeves (Tr. 180-81). The hook portion of the poker was found adjacent to Reeves on another area of the floor (Tr. 186-87). Reeves had suffered severe head injuries, and one paramedic noticed that Reeves's left eye was swollen and protruding from its socket (Tr. 181-82). After placing a tube into Reeves so that he could breathe and starting an IV, the paramedics transported him by helicopter to St. Louis University Hospital (Tr. 182-84).

Meanwhile, Jefferson County sheriff deputies arrived at Reeves' residence at about 3 p.m. (Tr.

200). The first deputy arrived while Reeves was being treated by the paramedics (Tr. 200-01). As the deputy entered the home, he saw a piece of a fireplace poker several feet inside the door (Tr. 201-02). The victim, who was bleeding and had a hole in his skull, appeared to have been struck by something (Tr. 203-04).

Other deputies arrived and determined that there were no signs of forced entry; both the front and rear doors were open when police arrived (Tr. 255). They also determined that the fireplace poker had been broken into three pieces. The handle was found inside the door, and the two other pieces were located near where Reverend Reeves was lying (Tr. 241-45, 264-65). Police seized all three pieces of the poker, the center and tip of which had a considerable amount of blood on them (Tr. 269-73).

In addition to the blood pooling around the victim's body, police later discovered blood spatters around the mantel, walls, and both on the keyboard of an organ and the other fireplace tools, which were found undisturbed in a rack next to the fireplace (Tr. 245-49, 262, 264-67, 281). Blood drops were also found on a wheelchair ramp at the rear of the house and on an adjacent flagstone walk (Tr. 258-59). Police took samples of the blood found at the scene (Tr. 283, 456-58).

On the evening of the attack, June 3, 1994, the police spoke to Mrs. Reeves and asked her if she knew anyone who might have been responsible for the crime; she identified Petitioner (Tr. 405-06). Captain Edward Kemp of the Jefferson County Sheriff's office found an address for Petitioner in the 3100 block of Compton in St. Louis City and went

there (Tr. 406). Upon arriving at that address, Kemp saw a car matching the description of the car that had been parked outside the Reeves' residence. The car was parked across the street from the address listed for Petitioner (Tr. 407).

Paszkiewicz, who had seen the car outside the Reeves' residence, was brought along to identify the car, and he said that it was the same car that he had seen outside the Reeves' home (Tr. 407). Jefferson County deputies then contacted detectives from the St. Louis Metropolitan Police Department and knocked on the door of Petitioner's residence (Tr. 407). Petitioner's brother answered the door and told police that Petitioner had been taken to St. Louis Regional Hospital (Tr. 408).

Captain Kemp went to Regional Hospital and found Petitioner sitting on a gurney in the emergency room (Tr. 408-09). When Kemp identified himself to Petitioner, Petitioner said "I know why you're here, it's because of George. I killed George. I killed George. I killed George in Kimmswick. He also goes by the name of Kenny Reeves." (Tr. 409). Petitioner said he had killed Reeves because "he was a bad man" who deserved to be killed because he was evil (Tr. 409-10, 439). Petitioner was then arrested and informed of his Miranda rights (Tr. 410-11). Police also seized a gray T-shirt, blue jeans and tennis shoes that Petitioner was wearing (Tr. 328-32, 411). There were several drops of what appeared to be blood on the shoes, the legs of the pants, and the right waist area of the T-shirt (Tr. 343-44, 411-13). As Petitioner was being driven back to Jefferson County, he made several voluntary statements indicating that "he had no problem going to Hillsboro but he didn't want to go to Kimmswick because he

had done something bad in Kimmswick." (Tr. 415, 439-40).

When Reverend Reeves was admitted to St. Louis University Hospital, he was suffering from multiple skull lacerations, a depressed skull fracture (indicating pieces of the skull had been driven into the brain), and cerebral contusions (Tr. 376-77). Upon arrival, Reeves was taken to the operating room so that the skull fragments and non-functioning brain tissue could be removed from his brain (Tr. 377, 383-84). Dr. David Crafts, a neurosurgeon who treated Reverend Reeves, testified that the injuries he had sustained were consistent with being hit forcefully with a heavy object, such as a fireplace poker (Tr. 380, 389-90). The skull fragments had penetrated the portion of Reverend Reeves's brain that controls speech (Tr. 382, 384). After the initial surgery, Reeves was placed on a ventilator because he could not breathe on his own (Tr. 384-85). Because of his extensive brain injuries and the fact that he had not improved, Reeves's doctors concluded that his survival was highly unlikely; and even if Reeves did survive, he would most likely remain in a chronic vegetative state (Tr. 384-85, 393-94, 402). After consultation with his family, Reverend Reeves's ventilator was disconnected on June 5, 1994, two days after the attack, and he died several minutes later (Tr. 385, 392-93, 397, 558-60).

Dr. Phillip Burch, a medical examiner for the City of St. Louis, performed an autopsy on Reeves's body on June 6, 1994 (Tr. 285-89). Burch discovered a contusion, or bruise, on the right top of the Reeves's skull, as well as a two-inch long laceration above the right eye (Tr. 290-91). These injuries were

consistent with nonspecific blunt trauma (Tr. 290-91). He also found several holes above the left eye and around the left ear, which had been surgically repaired. These injuries were also consistent with blunt trauma (Tr. 292-93). Reeves's skull had also been fractured at its base (Tr. 293-95, 301-02). Dr. Burch testified that the fireplace poker found at the scene was hard enough to cause the victim's injuries and that those injuries were consistent with having been caused by that poker (Tr. 296-97, 308).

During Reeves's treatment at St. Louis University Hospital, surgeons had removed a five-inch plate of bone, as well as some damaged brain tissue, from Reeves's brain (Tr. 297-99). Dr. Burch found no defensive injuries on the Reeves's hands (Tr. 302-03). He determined that Reeves's death was a homicide caused by a blunt trauma to the head (Tr. 304-05). Dr. Burch concluded that some heavy object had impacted the left side of the Reeves's skull and caused a massive skull fracture (Tr. 306).

Captain Kemp testified at trial that the blood spatters on Petitioner's shoes, which were in the form of "streaks," indicated that the blood was in motion at a slight angle to the shoes at the time it hit the shoes (Tr. 425-26). These spatters were inconsistent with having walked through a pool of blood (Tr. 425-27). One bloodstain was in the form of a circular dot, indicating that the blood had been dripped from somewhere almost directly above the shoe (Tr. 427). Captain Kemp said that when he seized Petitioner's clothes, he saw no indication of any injuries to Petitioner's body and no signs that Petitioner himself had been bleeding (Tr. 426).

With respect to the blood spatters found at the Reeves's residence, Captain Kemp testified that some of the blood was spattered against the walls at a low angle, consistent with someone having been struck with an object while lying on the floor (Tr. 428-29, 431-32). Other spatters were consistent with having been caused by a person being struck while seated in a chair (Tr. 429-30). The blood spatters on Petitioner's T-shirt were consistent with those that would be found on an individual who had struck a victim both while the victim was sitting down and lying on the floor (Tr. 433-34).

Police obtained both a sample of the victim's blood, which was taken during the autopsy, and, by court order, a sample of Petitioner's blood (Tr. 312-15, 471, 473). A criminalist and forensic serologist at the Missouri State Highway Patrol's crime laboratory examined the blood samples from Petitioner and the victim, as well as blood samples taken from the floor of the victim's residence, the fireplace poker, and Petitioner's T-shirt, jeans, and shoes (Tr. 316, 477-80). The jeans, T-shirt and shoes, as well as the poker, all had human blood on them, and the sample taken from the floor was human blood as well; the poker also had human hair on it (Tr. 481-82). By comparing enzymes found in both samples, the serologist determined that the blood found on the poker could not have come from Petitioner (Tr. 482-83).

The serologist also conducted a DNA analysis on the various blood samples (Tr. 483-519). He determined that DNA found on the poker and on Petitioner's jeans was consistent with the victim's DNA and inconsistent with Petitioner's DNA (Tr. 500-14). He also estimated that the victim's DNA

profile occurred at a frequency of one in 100 million in both the Caucasian and black population (Tr. 515-19).

At trial, a teller at the United Postal Savings Bank in Arnold testified that she remembered Reverend Reeves as one of her regular customers (Tr. 362-63). During the winter and spring of 1994, Reverend Reeves would often come to the bank's drive-through window to conduct business. The teller recalled seeing a passenger in the van on several occasions but could not identify the person (Tr. 363-64). Reverend Reeves wrote several checks to the bank between January and April 1994. These checks were cashed by Reverend Reeves and ranged in amount from $150 to $400 (Tr. 365-67).

The teller also testified that a man named Richard Marcrum came in himself on several occasions and attempted to cash checks written to him on Reverend Reeves's account. On at least one occasion Marcrum was asked to produce identification but could not do so (Tr. 368). Reverend Reeves later spoke to the bank's manager and gave the bank permission to cash his checks for Marcrum without identification (Tr. 370-71). Although she could not identify Petitioner in court as being this man, the teller said she also recalled seeing the person she knew as Marcrum in the van with Reverend Reeves (Tr. 369).

After her husband's death, Mrs. Reeves discovered that Reverend Reeves had been altering the balances in the checkbook, apparently to make up for other checks which had not been entered in the register. Although most of the checks that had been written on the account were still among the

family's records, other checks were not there when Katie Reeves went through them (Tr. 550-51, 590-94).

Petitioner testified at trial stating that he could not remember what he did on the day Reverend Reeves was attacked and that he suffered from seizures. Petitioner also presented the testimony of eleven other witnesses on his behalf, including an expert witness, Dr. Allan Barclay, who testified about Petitioner's mental condition (Tr. 620-1061, 1120-1279). The state called one witness in rebuttal. Dr. Sam Parwatikar, who also testified about Petitioner's mental condition. (Tr. 1281-1309). The jury found Petitioner guilty of first degree murder and armed criminal action (Tr. 1376-77). On July 8, 1996, the trial court sentenced Petitioner to consecutive sentences of life imprisonment without the possibility of probation or parole on the first degree murder conviction and life imprisonment on the armed criminal action conviction.

Petitioner appealed, and the court of appeals affirmed (App. 15). Petitioner then sought post-conviction relief under Missouri Supreme Court Rule 29.15 (App. 15-16). After an evidentiary hearing, the circuit court denied post-conviction relief. The Missouri Court of Appeals affirmed (App. 23).

THE PETITION SHOULD BE DENIED

Petitioner contends that the Court should grant discretionary review in order to resolve a conflict between the circuits about whether there should be "cumulative assessment" of prejudice from individual claims of ineffective assistance of trial counsel (Petition, pages 21, 27). This case does not present a viable vehicle for resolving this putative conflict. The issue does not even present itself in the present case. Accordingly, the petition for writ of certiorari should be denied.

In his petition, petitioner complains that the court below "sliced up counsel's errors" and weighed their prejudicial impact without viewing that prejudicial impact cumulatively (Petition, page 29). The ground below was that petitioner received ineffective assistance of trial counsel in connection with counsel's handling of petitioner's mental health defense (App. 2). Strickland v. Washington, 466 U.S. 668 (1984) (ineffectiveness claim consisting of two elements: breach of duty by counsel and resulting prejudice). In the court below, the asserted breaches of duty by petitioner's counsel concern: (1) the introduction of medical records;[1] (2) the cross-examination of the state's expert; and (3) the hiring of a different/second expert (Petition, page 29). No

---

[1] Petitioner seems to complain that the court of appeals' analysis does not separately discuss counsel's failure to endorse treating physician witnesses and to introduce medical records (Petition, pages 14-16). Ironically, the court below treated these claims together because the treating physicians would merely have provided foundation for the medical records (App. 39 & n.6).

aspect of the ineffective assistance this claim, singularly or cumulatively, warrants relief; thus, the court below properly denied relief. And that denial of relief is not worthy of discretionary review.

Concerning claim 3, the hiring of a different/second expert, the court below held that petitioner failed to show a breach of duty. "Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion" (App. 49-50). Petitioner does not suggest this analysis is wrong or otherwise worthy of discretionary review. Because that issue or claim was resolved on the basis of duty, not prejudice, the facts of this claim present no basis upon which to apply "cumulative assessment" of the prejudicial impact of counsel's errors.

And in connection with claims 1 (medical records) and 2 (cross-examination), the court of appeals actually performed "cumulative assessment" of the prejudicial effect of counsel's errors. In conducting its review of the ineffective assistance of counsel claim, the court of appeals used the standard initially set forth by this court in Strickland v. Washington, 466 U.S. 668 (1984) (App. 28). The court below's application of the Strickland standard was informed by this court's subsequent decisions in Kimmelman v. Morrison, 477 U.S. 365 (1986); Schriro v. Landrigan, 127 S.Ct. 1933 (2007); Rompilla v. Beard, 545 U.S. 374 (2005) and Wiggins v. Smith, 539 U.S. 510 (2003) (App. 28-32). The court of appeals' habeas review was also done through the statutory lenses provided by the

Congress in the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Title I, Section 104, 110 Stat. 1218; 28 U.S.C. §2254(d) (App. 32-34).

This Court's review of the court of appeals' analysis will show that the court of appeals conducted "cumulative assessment" of the prejudice inquiry. First, petitioner points to no portion of the opinion to show that the court below did not view the prejudicial effect cumulatively[2] (Petition, pages 29-31). Second, the court below actually spoke in terms of the need to scrutinize "counsel's omissions" and the "state courts' assessments of counsel's omissions" (App. 35) (emphasis added). The court below articulated the prejudice standard as a cumulative one.

Third, not only did the court of appeals articulate the standard as cumulative, it also applied that standard cumulatively. "In sum, as we explained below, we conclude that Speer's decisions that may have fallen below the level of acceptable competence did not result in prejudice to Marcrum, and Speer's decisions about what expert to present did not fall below the level of acceptable performance" (App. 37) (emphasis added). The language from the court below emphasized its "cumulative assessment."

---

[2] Petitioner refers to other Eighth Circuit decisions that decline to view ineffective-prejudice cumulatively (App. 23 citing Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) and Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)). The court below did not rely on either decision in its opinion denying relief (App. 36-52).

Fourth, further evidence of the court of appeals' "cumulative assessment" is found in the analysis of the specific claims. The court of appeals did not examine the 700 pages of medical records page by page, concluding there was no prejudice from each individual page. Instead, treating the records as a whole, the court concluded there was no Strickland prejudice. "Even if the notations had been read to the jury by the treating doctors, there is no reason to think the jury could have digested them and discerned a causal connection between the lack of medication, serial seizures, psychosis and paranoia and violence." (App. 41) (emphasis added). Later in the opinion, the court analyzed the prejudice issue specifically based on two different laboratory reports (App. 41).

Similarly, the court conducted "cumulative assessment" of the cross-examination claim (App. 45-46). The Court can determine that it is "cumulative" because of the court's reference to the entire record (App. 46). The court reasonably concluded that it would have not been productive to impeach state expert Dr. Parwatikar for saying there was no evidence of a connection between Marcrum's psychosis and violent behavior when that conclusion was the same as the conclusions of defendant's expert, Dr. Barclay.

Finally, the cumulative aspect of the court of appeals analysis is manifested in its conclusion:

> It was not objectively unreasonable for the Missouri Court of Appeals to find that Marcrum suffered no prejudice from Speer's failure to

> introduce the medical records or cross-examine Parwatikar.

(App. 49). Petitioner may protest that the court below used a disjunctive connector between "the medical records" and "cross-examine Parwatikar." Even if that contention were correct, if one were to add "no prejudice from Speer's failure to introduce the medical record" to "no prejudice from Speer's failure to.... cross-examine Parwatikar" the result remains the same (App. 49). "No prejudice" plus "no prejudice" equals "no prejudice."

Petitioner may also argue that counsel failed to obtain a second expert. But as noted earlier, the court of appeals resolved that issue on the basis that petitioner failed to show a breach of duty (App. 49-51). Giving all aspects of ineffectiveness ground "cumulative assessment," combining "no prejudice" with "no prejudice" with "no breach of duty," the court of appeals correctly concluded that petitioner "was not denied his right to effective assistance of counsel at trial" (App. 52).

CONCLUSION

Because the issue presented in the petition for writ of certiorari was not actually resolved against petitioner in the court below, the petition for writ of certiorari should be denied.

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No. 07-1566

Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RICHARD LOUIS MARCRUM,

Petitioner,

v.

DON ROPER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

Respondent does not dispute the existence of a deep and acknowledged circuit split on the question presented:

> Whether courts addressing Sixth Amendment claims of ineffective assistance of counsel must determine *Strickland* prejudice for each error of trial counsel individually or whether they may evaluate the cumulative effect of counsel's errors to determine whether they undermine confidence in the outcome of the trial.

See Petitioner's Br. at 21-27 (describing three to five circuit split). Respondent also does not dispute that

the question is one of exceptional importance "at the heart of safeguarding a criminal defendant's constitutional right to effective counsel." *See* NACDL Br. at 2.

Instead, Respondent contends only that the court of appeals below ignored more than sixteen years of its own precedent and "actually performed 'cumulative assessment' of the prejudicial effect of counsel's errors." *See* Resp. Br. at 13. Respondent is wrong. The panel in fact applied well-established circuit precedent rejecting a cumulative approach.

In contrast to the First, Second, Seventh, Ninth, and Tenth Circuits, the Eighth Circuit has held consistently since at least as early as 1991 that the "cumulative impact" of counsel's errors *cannot* be the basis for a finding of *Strickland* prejudice. *See Girtman v. Lockhart*, 942 F.2d 468, 474-75 (8th Cir. 1991). The court of appeals has hewed to its holding in *Girtman* every time it has faced the issue. *See, e.g.*, *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."); *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002) ("In our circuit a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test."); *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) ("Therefore, we have no hesitancy in . . . concluding the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief."); *United States v. Brown*, 528 F.3d 1030, 1034

(8th Cir. 2008) ("we have repeatedly rejected the cumulative error theory of post-conviction relief").

The panel below followed, as it must, this well-established Eighth Circuit rule. Respondent's contention that the panel ignored this circuit precedent is particularly surprising when one considers that Chief Judge Loken, who joined the decision on *Strickland* prejudice in this case, also authored the opinion in *Brown* earlier this year and joined the decisions in *Middleton* and *Hall*. The panel's judgment – as clearly shown on the face of the opinion – rests on an individualized assessment of prejudice. The panel examined all four of counsel's errors seriatim without once assessing the cumulative effect of all of the errors.

First, the court of appeals dismissed any prejudicial impact of counsel's failure to timely disclose Marcrum's treating physicians, which resulted in their exclusion at trial, because it determined that there was no showing "that the various treating doctors would have added anything to the information shown in the medical records." App. 39 n.6.

Second, with respect to counsel's failure to introduce Marcrum's medical records, the court of appeals determined "it is not the failure to introduce the records themselves that would have changed (or had a reasonable probability of changing) the outcome of the trial" because the records were "couched in medical terminology that would mean almost nothing to a jury of lay people" and "there is no reason to think the

jury could have digested them and discerned a causal connection between lack of medication, serial seizures, psychosis, and paranoia and violence." App. 41. Rather than considering the obvious joint prejudicial impact of both failures – namely, that the treating physicians could have explained the medical records – the court of appeals instead determined that the medical records would have had no impact without "an expert's opinion." App. 42.

Third, with respect to counsel's complete failure to cross-examine the State's expert on his clearly erroneous testimony regarding Marcrum's medical history, the court of appeals again examined prejudice in isolation, stating that these "tactics would have done no good" because the defense expert agreed with the State's expert on certain points. App. 46.

Fourth, the court did not consider the prejudice resulting from counsel's failure to cure these errors with his own expert because counsel "obtained the assistance of a qualified expert." App. 49-50.

Not once did the court of appeals consider the cumulative prejudicial effect of all of counsel's errors. This effect was not trivial. In the court of appeals' own words:

> th[e] jury never saw or heard about medical evidence that, with scrutiny and analysis, could have shown a well-established pattern in which Marcrum failed to take his anti-convulsants, suffered from serial seizures,

> and fell into a psychosis in which his behavior was paranoid and violent. Nor did the jury see or hear about medical records from the night of the killing diagnosing Marcrum as psychotic and showing a sub-therapeutic level of anticonvulsant in his blood.

App. 36.

Respondent quotes the words "omissions" and "decisions" from various portions in the court of appeals' decision, but none of those portions include a cumulative analysis of prejudice. Indeed, as Respondent admits (Resp. Br. at 15-16), the non-cumulative approach of the court of appeals is highlighted by its disjunctive statement "that Marcrum suffered no prejudice from Speer's failure to introduce the medical records *or* cross-examine [the State's expert] Parwatikar." App. 49 (emphasis added).

Respondent also claims that the analysis must have been cumulative because the "court of appeals did not examine the 700 pages of medical records page by page, concluding there was no prejudice from each individual page." Resp. Br. at 15. But Respondent ignores the fact that the failure to introduce the medical records was a single error resulting from counsel's belief that the trial court excluded the records, rather than a series of errors involving each page of the records.

Respondent's final point that "'[n]o prejudice' plus 'no prejudice' equals 'no prejudice'" fails to account for the possibility that "the whole may be

greater than the sum of its parts." *Union Pac. R.R. Co. v. Hadley*, 246 U.S. 330, 332 (1918). As *amicus curiae* National Association of Criminal Defense Lawyers ably demonstrated, Respondent's argument violates the logical principle known as the fallacy of composition. *See* NACDL Br. at 14-18.

Respondent does not deny the importance of the issue, noted and left unresolved since *Banks v. Dretke*, 540 U.S. 668 (2004), and that resolution of this deep and long-standing division within the circuits is necessary to ensure the "fundamental fairness" of criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). This case presents an ideal vehicle to resolve this division. The court of appeals acknowledged the critical effect of counsel's errors – that the jury never heard that Marcrum was diagnosed as psychotic on the day of the killing and that this diagnosis was consistent with Marcrum's medical history – but it never analyzed the ultimate prejudice resulting from the accumulation of counsel's multiple errors.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FILED
JUL 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1566

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in assessing Sixth Amendment ineffective assistance of counsel claims under *Strickland* v. *Washington*, 466 U.S. 668 (1984), errors by trial counsel must be considered individually or cumulatively.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that Sixth Amendment ineffective assistance of counsel issues are addressed uniformly and that trial counsel error is addressed in a realistic manner that does not segregate individual errors in an artificial manner, but instead looks to the overall effect of error to determine confidence in the fairness of a trial.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

REASONS FOR GRANTING THE PETITION

This case presents a question that lies at the heart of safeguarding a criminal defendant's constitutional right to effective counsel. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Since that decision, both state and federal courts have disagreed on the question of how properly to analyze prejudice.

The Eighth Circuit, applying its settled approach, concluded that because each alleged error of counsel in isolation would not have been reasonably likely to change the jury's mind, the defendant had not stated a *Strickland* claim. See, *e.g.*, Pet. App. 36-37, 48-49. Also pursuant to that settled approach, the court below refused to consider whether the overall fairness of the proceeding was undermined by the cumulative effect of the numerous errors committed by counsel.

This Court's review is warranted. In addition to the split among the federal courts identified by petitioner, Pet. 21-27, the States also are divided about the appropriate standard for determining *Strickland* prejudice. At least fourteen States to have addressed the issue disagree with the Eighth Circuit and employ some version of a cumulative analysis. In contrast, only one State appears to use an individual analysis consistent with the Eighth Circuit's approach. Other States have internal inconsistencies or have failed to resolve the issue. Simply put, there is a deep lack of uniformity between state courts, further necessitating review by this Court.

The decision of the Eighth Circuit also conflicts with the underlying rationale of other standards used to determine the reliability of a criminal trial's outcome, in which courts overwhelmingly focus on the cumulative effect of errors. In particular, courts generally consider error on a cumulative basis to determine the materiality of withheld *Brady* evidence; to determine whether multiple harmless errors undermined the fairness of the trial; and to consider whether prosecutorial misconduct warrants a new trial. The Eighth Circuit's decision is in conflict with this general trend in the criminal context that errors should be reviewed cumulatively to determine whether confidence in the outcome of the trial has been undermined.

Finally, the decision below violates the logical principle know as the "fallacy of composition." The fallacy of composition recognizes that the whole, when taken as a whole, can be different than its parts. Analyzing individual errors by counsel in isolation falls prey to this fallacy. Although any given error may not, by itself, be serious enough to call the reliability of a verdict into question, a series of such errors viewed as a whole and in relation to one another may do so.

For all of these reasons, as explained more fully below, this Court should grant review.

ARGUMENT

I. STATE COURT STANDARDS FOR ADDRESSING CLAIMS OF *STRICKLAND* PREJUDICE CONFLICT.

1. Of the States that appear to have addressed the question presented, at least fourteen—California, Colorado, Georgia, Illinois, Indiana, Iowa, Maryland,

New Jersey, New Mexico, New York, Ohio, Texas, West Virginia, and Wisconsin—have followed some iteration of a cumulative approach to *Strickland* error. Even within these States, however, courts in at least two States (Illinois and California) have held that the cumulative analysis can be applied only where there is sufficient prejudice as to at least one individual error.

In contrast, at least one State (Arkansas) has expressly rejected the cumulative approach—applying something similar to the Eighth Circuit's approach—and at least one State (Kentucky) uses a hybrid approach. In addition, there appears to be an intrastate conflict in at least one State (Florida) about the appropriate analysis.

This variety in the application of what should be a single federal constitutional standard, transforms what should be "the uniform 'law of the land' into a crazy quilt." *Kansas* v. *Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring); accord *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

The majority view makes sense, as cumulative consideration of errors ensures "confidence in the outcome" of the trial, which is the hallmark of the *Strickland* prejudice analysis. *Strickland*, 466 U.S. at 694; see also, *e.g.*, *State* v. *Thiel*, 665 N.W.2d 305, 327-28 (Wis. 2003) (finding that the cumulative effect of counsel's deficiencies prejudiced the defense to an extent that it "undermines our confidence in the outcome of the trial").

Further, many States have considered the cumulative analysis to be dictated by the language of *Strickland*. See, *e.g.*, *Schmitt* v. *State*, 779 A.2d 1004, 1014 (Md. Ct. Spec. App. 2001) (concluding that *Strickland* itself made clear that "it is the totality of circumstances or cumulative effect of all errors that must be assessed in ruling on ultimate trial prejudice"). For example, the Ohio Supreme Court concluded that "*Strickland* directs an examination of the "totality of the evidence" and "therefore considers claimed counsel's errors in the aggregate." *State* v. *Gondor*, 860 N.E.2d 77, 90 (Ohio 2006). Similarly, the Georgia Supreme Court focused on *Strickland*'s use of the plural "errors" in its prejudice description to conclude that "not . . . each individual error by counsel should be considered in a vacuum." *Schofield* v. *Holsey*, 642 S.E.2d 56, 60 n.1 (Ga.) (citing *Strickland*, 466 U.S. at 687), *cert. denied sub nom. Holsey* v. *Hall*, 128 S. Ct. 728 (2007); see also *Ex Parte Aguilar*, No. AP-75526, 2007 WL 3208751, at *3 (Tex. Crim. App. Oct. 31, 2007) (observing that *Strickland* embraces a cumulative analysis because its treatment of prejudice "is replete with the use of the plural tense, referring to counsel's alleged 'errors'").

2. As detailed in the accompanying appendix, at least fourteen States appear to consider counsel's errors cumulatively. See App. at 1a-4a. Even within those States, however, the cumulative analysis has been applied differently. For example, in California and Illinois, notwithstanding the general application of a cumulative approach, there is at least one state supreme court decision suggesting that cumulative analysis only will be undertaken if there are individual claims of error that alone meet the *Strickland* standard—which is not really a

cumulative analysis at all. In one California Supreme Court decision, the court stated that the defendant "failed to meet his burden of establishing inadequate representation and resulting prejudice as to each claim of ineffective assistance of counsel. Accordingly, we can find no cumulative deficiency assessing these contentions in the aggregate." *People* v. *Cox*, 809 P.2d 351, 374 (Cal. 1991). Similarly, the Illinois Supreme Court rejected defendant's claims of ineffective assistance of counsel in one case because it concluded that counsel's performance was not deficient or, even if deficient, did not result in prejudice under *Strickland*, observing that "[b]ecause we have rejected every [individual] claim of error, cumulative-error analysis is not necessary." *People* v. *Perry*, 864 N.E.2d 196, 222 (Ill. 2007). If a court reserves examination of the cumulative prejudice of individual errors to circumstances in which it already has deemed those individual parts independently to meet the *Strickland* prejudice standard, however, that is not a cumulative analysis in any meaningful sense.

At least one State, Arkansas, expressly rejects the cumulative analysis under *Strickland*, instead requiring that *Strickland* prejudice be assessed independently for each alleged error of counsel, and not cumulatively. See *Howard* v. *State*, 238 S.W.3d 24, 50 (Ark. 2006) ("[T]his court has held that we do not recognize cumulative error in allegations of ineffective assistance of counsel.").

Another State, Kentucky, has adopted a hybrid approach. Kentucky courts will consider errors cumulatively to determine *Strickland* prejudice, but only those errors in which "some prejudice, however slight, could have resulted" will be included in the cumulative analysis. *Marquez* v. *Commonwealth*, No.

2003-CA-001431-MR, 2005 WL 195188, at *1 (Ky. Ct. App. Jan. 14, 2005). Accordingly, Kentucky sets a minimum threshold for prejudice even to enter the cumulative calculus.

In at least two States, South Carolina and North Dakota, the appropriate standard for determining *Strickland* prejudice is expressly recognized to be an open issue. See, *e.g.*, *Lorenzen* v. *State*, 657 S.E.2d 771, 779 n.3 (S.C. 2008) (noting that whether the culmination of several errors that "themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina"); *Garcia* v. *State*, 678 N.W.2d 568, 578 (N.D. 2004) (citing conflicting opinions as to whether errors should be considered cumulatively for purposes of the *Strickland* analysis but not reaching the issue because both standards were satisfied).

Finally, in at least one State (Florida) there is an intrastate conflict (or, at least, intrastate inconsistency) with no clear rule from the State's highest court. The Florida Supreme Court has observed both that the fact that a defendant did not satisfy the *Strickland* standard as to individual claims undermined any claim of cumulative prejudice and also that an evidentiary hearing may be necessary because the cumulative effects of ineffective assistance of counsel claims could establish prejudice. *Compare Monlyn* v. *State*, 894 So. 2d 832, 838 (Fla. 2004) (per curiam), *with Harvey* v. *Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995) (per curiam).

3. As this discussion illustrates, there is a significant lack of uniformity, both within and among the States. These differing rules in state--and federal, see Pet. 21-27—courts lead to truly anomalous, inconsistent, and unfair results. What

should be uniform constitutional rights of criminal defendants are actually addressed in significantly different ways dictated by the mere happenstance of geography or whether a case is being heard by a federal or state court. For example, a criminal defendant in West Virginia *state* court is entitled to have counsel's errors considered cumulatively. See *State ex rel. Daniel* v. *Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995). In contrast, a criminal defendant in a West Virginia *federal* court down the street is only entitled to have the same trial errors considered individually. See *Fisher* v. *Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); see Pet. 23-24. Similarly, two defendants convicted for the same crime in different States, say Arkansas and Georgia, would face quite different review standards. Counsel for each defendant may have behaved in exactly the same way in each defendant's trial, even with the same evidence and same overall case. Yet that same error will be viewed quite differently depending on whether the appeal is heard in Georgia, where it will be considered cumulatively, see *Schofield*, 642 S.E.2d at 60 n.1, or Arkansas, where only a sufficient individual error would entitle the defendant to relief, see *Howard*, 238 S.W.3d at 48. Such a "crazy quilt" of constitutional law, *Marsh*, 548 U.S. at 185 (Scalia, J., concurring), currently governs resolution of claims asserting constitutionally inadequate counsel. Criminal defendants' constitutional rights should not vary by the happenstance of their location.

Thus, there is both a conflict and significant confusion among the States as to the proper standard for determining whether a defendant has received the constitutionally promised effective counsel. This Court should grant certiorari to resolve the conflict in state—and federal—courts and provide much needed

guidance as to the proper application of the Sixth Amendment as interpreted in *Strickland*.

II. THE EIGHTH CIRCUIT'S APPROACH CONFLICTS WITH OTHER FEDERAL STANDARDS FOR DETERMINING WHEN ERROR SUFFICIENTLY UNDERMINES CONFIDENCE IN TRIAL RELIABILITY.

In several criminal contexts other than *Strickland*, courts are called upon to determine whether errors undermine confidence in the outcome of a trial, or affect the reliability of a verdict. In each of these contexts, detailed below, this Court and the courts of appeals generally have required consideration of the *cumulative* effect of errors to determine whether the reliability of the verdict has been undermined.

1. First, and perhaps most telling, is an examination of the analysis used to determine whether evidence withheld by the prosecution in a criminal trial is material and thus amounts to a violation of the standards of *Brady* v. *Maryland*, 373 U.S. 83 (1963). *Brady* governs a prosecutor's duty to disclose evidence favorable to the defense. *Id.* at 83. The Court has explained that a defendant must show that evidence withheld is "material" in order to make out a *Brady* violation. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667 (1985). Under *Kyles* v. *Whitley*, 514 U.S. 419, 436-37 (1995), courts must review the combined effect of all withheld evidence.

The standards for *Brady* materiality and *Strickland* prejudice have developed together. As the Court observed in *Strickland*, the "appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." 466 U.S. at 694. In *Bagley*, the Court explicitly adopted the *Strickland*

standard to determine materiality under *Brady*. *Bagley*, 473 U.S. at 694. Accordingly, the language of the *Brady* and *Strickland* standards is the same. *Compare Bagley*, 473 U.S. at 682 (to establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome"), *with Strickland*, 466 U.S. at 694 (to establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Despite the nearly identical language governing these standards, they are not applied the same way in many federal and state courts. As for *Brady* errors, as noted, this Court has held that evidence must be considered cumulatively to determine whether a *Brady* violation was material and thus amounted to a constitutional violation. *Kyles*, 514 U.S. at 436-37. As this Court explained, even if "confidence that the verdict would have been the same could survive" considering only a single piece of the withheld evidence, "confidence that the verdict would have been unaffected cannot survive when" the suppressed evidence *in toto* may well have allowed the jury to reach a different conclusion. *Id.* at 454. Thus, the uniform law of the land is that *Brady* materiality must be determined cumulatively. In contrast, as detailed above and in petitioner's papers, the law of the land on the similar *Strickland* analysis has become anything but uniform. See Pet. 21-27; § I, *supra*. Thus, notwithstanding identical language

setting forth the two standards, they are applied in divergent ways.

There is no reason that the cumulative analysis, applicable in the *Brady* context to determine whether confidence in the trial has been undermined, should not apply in the *Strickland* context to answer the very same question. The "laws governing the right to counsel and suppression of evidence have long shared the same core value, reliability of outcomes." John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1155 (2005). Not only is the language setting forth the standards nearly identical, but the focus of the inquiries and the ultimate question to be answered—whether confidence in the reliability of the verdict has been undermined—is the same. Accordingly, the cumulative approach should apply to both.

2. The decision below also is in tension with the approach of the majority of federal courts of appeals to harmless error review in criminal trials, which consider whether multiple errors cumulatively amount to a constitutional violation, rather than viewing them in isolation. As these courts recognize, the "effect of multiple errors in a single trial may cast such doubt on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal." *United States* v. *Rahman*, 189 F.3d 88, 145 (2d Cir. 1999); see also *United States* v. *Munoz*, 150 F.3d 401, 418 (5th Cir. 2005) ("an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial"); *Darks* v. *Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (observing that the "cumulative effect of two or more individually harmless errors has the potential to

prejudice a defendant to the same extent as a single reversible error"). The cumulative error rule was suggested by this Court in *Taylor* v. *Kentucky*, where it reached the "conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness." 436 U.S. 478, 488 n.15 (1978). This rule both makes sense and comports with the purpose of ensuring a fundamentally fair trial. Perhaps for these reasons, every federal circuit considers the effect of cumulative errors on direct review.[2] Most courts of appeals to address the issue also apply cumulative error analysis in the review of *habeas corpus* petitions.[3]

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[2] *See United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993); *Rahman*, 189 F.3d at 145; *Marshall* v. *Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002), *cert. denied sub nom. Cathel* v. *Marshall*, 574 U.S. 1035 (2006); *United States* v. *Martinez*, 277 F.3d 517, 534 (4th Cir. 2002); *United States* v. *Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *United States* v. *Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004); *United States* v. *Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996); *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992); *United States* v. *Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988); *Darks* v. *Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003); *United States* v. *Adams*, 74 F.3d 1093, 1099-1100 (11th Cir. 1996); *United States* v. *Jones*, 482 F.2d 747, 749 & n.2, 755 (D.C. Cir. 1973).

[3] *See Mello* v. *DiPaulo*, 295 F.3d 137, 151-52 (1st Cir. 2002); *Marshall* v. *Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002); *Fisher* v. *Angelone*, 163 F.3d 835, 852-53 & n.9 (4th Cir. 1998); *Bell* v. *Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989); *Karis* v. *Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002); *Miller* v. *Mullin*, 354 F.3d 1288, 1301 (10th Cir. 2004) (per curiam); *see also Davis* v. *Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994) (considering cumulative effect of prosecutorial misconduct claim on *habeas* review). Although the Fifth Circuit also considers cumulative errors on *habeas* review, it limits the types of errors to be considered. *See Westley* v. *Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (recognizing a claim for cumulative

3. A cumulative approach also is widely applied in determining whether prosecutorial misconduct necessitates a new trial. This Court, for example, looked to allegations of prosecutorial misconduct *in toto* in *Berger* v. *United States*, 295 U.S. 78 (1935). That case considered the trial as a whole and concluded that prosecutorial error warranted a new trial because this was not a case "where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 84-89.

Many courts of appeals have expressly taken a cumulative approach. See, *e.g.*, *Davis* v. *Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994) (looking to whether "the prosecutor's conduct as a whole violated the Fourteenth Amendment due process right to a fair trial").[4] In the prosecutorial misconduct context, even

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error on *habeas* relief only where the individual errors involved matters of constitutional dimension, rather than violations of state law; the errors were not procedurally defaulted; and the errors infected the trial to the point that the resulting conviction violated due process). The Sixth Circuit has taken a hybrid approach. *Compare Cooper* v. *Sowders*, 837 F.2d 284, 288 (6th Cir. 1988) ("This court has found that the trial court committed error with regard to each of petitioner's claims. We hold that, when considered cumulatively, these errors produced a trial setting that was fundamentally unfair."), *with Davis* v. *Burt*, 100 F. App'x 340, 351 (6th Cir. 2004) ("Cumulative error is not a basis for granting habeas relief in non-capital cases."). The Eighth Circuit has rejected the cumulative analysis in the *habeas* context. *Wainwright* v. *Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

[4] *See United States* v. *Mooney*, 315 F.3d 54, 61 (1st Cir. 2002); *Fahy* v. *Horn*, 516 F.3d 169, 198-99 (3d Cir. 2008); *Slagle* v. *Bagley*, 457 F.3d 501, 515 (6th Cir. 2006), *cert. denied*, 127 S. Ct.

the Eighth Circuit recognizes a cumulative error rule, in conflict with its rule for *Strickland* prejudice. See *United States* v. *Crumley*, 528 F.3d 1053, 1064 (8th Cir. 2008); *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) ("Prejudice sufficient to warrant reversal may result from the cumulative effect of repeated improper comments by the prosecutor."). This approach makes sense because the purpose of the analysis is to determine whether the misconduct as a whole infected the proceeding, such that the reliability of the proceeding is in doubt.

Thus, in many criminal contexts, this Court and lower appellate courts recognize that to determine accurately whether the fairness of a trial has been undermined, courts must consider the cumulative effect of alleged errors. This follows because, as further explained below, "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." *United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). This Court should grant certiorari to correct the Eighth Circuit and other courts' contrary approach and to harmonize the application of criminal defendants' constitutional right to a trial that is fundamentally fair.

III. THE EIGHTH CIRCUIT'S RULE VIOLATES FUNDAMENTAL PRINCIPLES OF LOGIC.

Viewing trial counsel errors in artificial isolation, rather than cumulatively, also violates the logical principle know as the "fallacy of composition." This logical error involves "an invalid inference from the

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2977 (2007); *Fields* v. *Woodford*, 309 F.3d 1095, 1109 (9th Cir. 2002); *United States* v. *Blunt*, 187 F. App'x 821, 833 (10th Cir.), *cert. denied sub nom. Copeman* v. *United States*, 127 S. Ct. 453 (2006).

nature of the parts to the nature of the whole." C. Stephen Layman, *The Power of Logic* 143 (McGraw Hill 3d ed. 2005) (emphasis omitted); see *The Cambridge Dictionary of Philosophy* 432 (Robert Audi ed., Cambridge Univ. Press 2d ed. 1999) (the fallacy of composition is "the error of arguing from a property of parts of a whole to a property of the whole"). The fallacy of composition exists because the whole, when taken as a whole, can be different (whether greater or lesser) than its parts when taken separately. Accordingly, as a logical matter, "the following argument form is *not* in general valid: 'Each part of *X* has attribute *Y*; therefore, *X* itself has attribute *Y*.'" Layman, *supra*, at 143.

One well-known aspect of the fallacy of composition is that "the whole may be greater than the sum of its parts." *Union Pac. R.R. Co.* v. *Hadley*, 246 U.S. 330, 332 (1918); see *Sepulveda*, 15 F.3d at 1196 (observing that "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts"). A classic example of this fallacy "arises where each passenger on a lifeboat seeks to add one more piece of luggage." *Fontaine* v. *Ryan*, 849 F. Supp. 190, 194 n.2 (S.D.N.Y. 1993). Although each individual passenger's bag may not matter, in the aggregate, a number of different passengers' extra bags can literally sink the lifeboat. Another example of the fallacy is the following statement: "Each of the parts of this airplane is very light. Therefore, the airplane itself is very light." Layman, *supra*, at 143. This inference is wrong, of course, because if enough light parts are joined together, the airplane itself may become quite heavy. Courts and commentators have recognized many similar examples. See, *e.g.*, *A&A Mech., Inc.* v. *Thermal Equip. Sales Inc.*, 998 S.W.2d

505, 513 n.6 (Ky. Ct. App. 1999) (giving the following example of the fallacy of composition: "Because the atoms of this book are invisible, the book must be invisible"). Accordingly, a fundamental teaching of this fallacy is that individual parts, if viewed in isolation, may present a distorted picture of the whole.

The Eighth Circuit's (and other courts') practice of analyzing individual errors by counsel in isolation from one another is emblematic of this fallacy. Although any given error may not, by itself, be serious enough to call the reliability of a verdict into question, a series of such errors viewed as a whole and in relation to one another may do so. Simply put, "[i]f one focused on the reliability-impact of each individual error, one would, in essence, fail to see the forest for the trees." Blume & Seeds, *supra*, at 1157.

This fundamental logical error made a difference to the ruling below, as it will in many cases. As petitioner's brief details, a key aspect of the defense at trial was petitioner's mental competence and propensity for violence when not taking antipsychotic medications. Pet. 4-6. Viewing each of trial counsel's alleged errors individually, the Eighth Circuit concluded that none standing alone was sufficiently prejudicial to warrant relief. Pet. App. 41-49 & n.9. In particular, as detailed in the District Court opinion, trial counsel made the following errors: the failure to list several witnesses (including petitioner's treating physicians) in time to call them to testify; the failure to cross-examine the prosecution's mental health expert witness who testified (wrongly) that there was no evidence to connect petitioner's psychosis with violent behavior; and the failure to introduce petitioner's extensive mental health medical records into evidence. *Id.* at 92-95. Yet the

appellate court below dissected each individual alleged error, without viewing it in relation to the overall picture. It failed to acknowledge that the pieces of evidence the jury did not see were important not only on their own, but also because they would have reinforced each other and created an overall picture more meaningful than the sum of the parts.

For example, the medical records would have provided a context in which statements by petitioner's treating physicians and the government's own expert could establish a mental health pattern of violence when petitioner was not using antipsychotic medications. Testimony from petitioner's treating physicians could have clarified the meaning of his mental health medical records. Evidence from the state's own expert that supported the defense theory of the case, had it been elicited on cross-examination, would have cast greater plausibility on the whole body of evidence and lent greater weight to the testimony from the physicians and the evidence in the medical records. Had it not been for this compilation of trial counsel error, a comprehensive picture could have emerged illustrating a connection between the defendant's failure to take medication and his resulting seizures and psychotic and violent behavior. See Pet. App. 92-97, 99.

Viewing each of these errors in isolation, however, the court below failed to see the way that they build on each other. The logic of the court's decision is that because correcting any individual error would not have done enough to alter the outcome of the trial, then correcting all of them would similarly fail to make a difference. This is a classic example of the fallacy of composition.

Finally, although the court below failed to recognize that the whole could be greater than its parts, we do

not suggest that viewing error cumulatively always will result in finding increased harm to the defendant. To the contrary, a single error that seems weighty in isolation may be neutralized by the totality of the overall context. That is, in some cases, the whole may be less than its parts. See generally Layman, *supra*, at 143; *Smith* v. *Farley*, 59 F.3d 659, 668 (7th Cir. 1995) (although "[t]he whole is sometimes greater than the sum of the parts, . . . having considered all the alleged errors . . . we are unpersuaded that [defendant] was deprived of any of his rights under the U.S. Constitution").

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 17, 2008

State Courts Applying A Cumulative Approach*

California. See *In re Jones*, 917 P.2d 1175, 1193 (Cal. 1996) (concluding that counsel's deficient performance, considered in the aggregate, sufficiently undermined confidence in the outcome of the trial).

Colorado. See *People* v. *Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2003) (recognizing that "prejudice may result from the cumulative impact of multiple attorney errors").

Georgia. See *Schofield* v. *Holsey*, 642 S.E.2d 56, 60 n.1 (Ga. 2007) (concluding that trial counsel's errors should be considered together as one issue under the *Strickland* prejudice prong and disapproving prior cases holding to the contrary).

Illinois. See *People* v. *Foster*, 660 N.E.2d 951, 959-62 (Ill. 1995) (applying cumulative error analysis to ineffective assistance of counsel claims and finding no "cumulative error" and thus no prejudice under *Strickland*).

Indiana. See *Grinstead* v. *State*, 845 N.E.2d 1027, 1036 (Ind. 2006) ("Certainly, the cumulative effect of a number of errors can render counsel's performance ineffective."); *Smith* v. *State*, 547 N.E.2d 817, 819-20 (Ind. 1989) ("In an ineffective assistance of counsel context . . . while each alleged error or omission may be reviewed separately under the substandard performance prong of *Strickland*, we then assess the cumulative prejudice accruing to the accused to see whether the compilation of counsel's errors has rendered the result unreliable, necessitating reversal under *Strickland*'s second prong.").

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* Where a state court of last resort had not opined, we have included relevant intermediate appellate court decisions.

Iowa. See *State* v. *McGee*, 707 N.W.2d 336 (Iowa Ct. App. 2005) (unpublished table decision), *available at* 2005 WL 2508416 (considering "whether the 'errors' cumulatively and in light of the 'totality of the evidence' resulted in prejudice" to the defendant); cf. *Smothers* v. *State*, No. 01-0452, 2002 WL 700959, at *5 (Iowa Ct. App. Apr. 24, 2002) (addressing defendant's claim that "if insufficient individually, the cumulative effect of the errors was so prejudicial that it denied him a fair and impartial trial, as well as effective assistance of counsel. We conclude Smothers received effective assistance of counsel. Accordingly, we find there was no cumulative error.").

Maryland. See *Bowers* v. *State*, 578 A.2d 734, 744 (Md. 1990) (concluding that lower court's decision to review "each charge of deficient performance and consequent prejudice, and to decide that no one charge alone was serious enough to meet both *Strickland* tests" was incorrect and that "[e]ven when individual errors may not be sufficient to cross the threshold, their cumulative effect may be").

New Jersey. See *State* v. *Marshall*, 690 A.2d 1, 88 (N.J. 1997) (holding that defendant could not show that "but for [counsel's] alleged deficiencies, individually and cumulatively, there is a reasonable probability that the result of the trial would have been different").

New Mexico. See *State* v. *Trujillo*, 42 P.3d 814, 828 (N.M. 2002) (stating that the court considers each individual allegation of ineffective assistance as well as their cumulative effect).

New York. See *People* v. *Brown*, 752 N.Y.S.2d 347, 348-49 (N.Y. App. Div. 2002) ("While no single error on counsel's part would constitute ineffective assistance of counsel, the cumulative effect of these

errors deprived the defendant of meaningful representation.").

Ohio. See *State* v. *Gondor*, 860 N.E.2d 77, 90 (Ohio 2006) ("The trial court properly considered the cumulative effect of trial counsels' errors.").

Texas. See *Ex Parte Aguilar*, No. AP-75526, 2007 WL 3208751, at *1 (Tex. Crim. App. Oct. 31, 2007) ("We hold, as we have indicated in the past, that such errors should be considered cumulatively.").

West Virginia. See *State ex rel. Bess* v. *Legursky*, 465 S.E.2d 892, 901 n.10 (W. Va. 1995) ("Even if we were to apply the *Strickland/Miller* analysis that an accused must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different, we would reverse this conviction because the Appellant has proven prejudice as a result of the cumulative impact of multiple deficiencies in defense counsel's performance."); *State ex rel. Daniel* v. *Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995) ("In making the requisite showing of prejudice, 'a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test.'") (quoting *Williams* v. *Washington*, 59 F.3d 673, 682 (7th Cir. 1995)).

Wisconsin. See *State* v. *Thiel*, 665 N.W.2d 305, 322 (Wis. 2003) ("Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding. Therefore, in determining whether a defendant has been prejudiced as a result of counsel's

deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland*.").